EJMcC-v-Department for Communities (II) [2021] NICom 12

Decision No: C1/20-21(II)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INDUSTRIAL INJURIES DISABLEMENT BENEFIT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 2 December 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from a decision of an appeal tribunal with reference BE/6238/19/67/M. An oral hearing of the appeal has not been requested.

2. For the reasons I give below, I dismiss the appeal.

Background

3. This appeal is addressed to the issue of whether an industrial injuries claimant, who suffered an injury in his workplace, was acting in the course of his employment when the accident occurred.

4. The appellant claimed industrial injuries disablement benefit (IIB) from the Department for Communities (the Department), on 1 September 2015. The claim was in respect of an accident that occurred on 28 June 2010. The appellant, a panel beater employed by Bombardier in its business of aircraft manufacture, stated that he was buffing the surface of a piece of metal on a buffing machine, when the piece of metal was projected outwards by the machine striking him on the right side of the head. He suffered significant injuries, including the loss of his right eye, a fractured jaw, a fractured cheekbone, a fractured orbital floor, lacerations to the eyebrow and eyelids, post-traumatic shock, mental health issues, chronic pain and trigeminal neuralgia by trauma.

5. His employer was asked to confirm the details of the incident. It confirmed that the appellant worked as a panel beater in Centre 04 panel shop and that the accident had occurred at the date and time stated.

However, the employer did not accept that at the material time the appellant was working. It stated that he was due to finish work at 15.40 hrs, and that at 17.30 hrs he was polishing a brass letterbox cover on a rotating machine polishing mop in an area where he had no authority to be. He was injured when the letterbox cover shot up from the polishing mop, striking him in the face and embedding itself in a wall.

6. On 20 October 2015 the Department decided that there had not been an industrial accident because the accident did not arise out of and in the course of the appellant's employment. The appellant requested a reconsideration of that decision on 30 November 2015. It appears that the Department may have overlooked that request until prompted by the appellant's solicitor on 11 April 2019. On 25 June 2019 he was informed that the decision had been reconsidered but not revised. He appealed.

7. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and two medically qualified members. After a hearing on 2 December 2019, the tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 23 March 2020. The appellant applied to the LQM for leave to appeal from the tribunal's decision and leave to appeal was granted by a determination of the salaried LQM issued on 16 July 2020. On 11 August 2020 the appellant lodged his appeal with the Office of the Social Security Commissioner.

Grounds

8. The grounds on which leave to appeal was granted were whether the incident which occurred on 28 June 2010 was an industrial accident which arose during the course of the appellant's employment.

9. The appellant, represented by Ms Lynn, solicitor, of Donnelly and Kinder, submits that the tribunal has erred in law in this context on the basis that:

    (i) the tribunal applied the wrong test in deciding that the accident did not arise out of an in the course of the appellant's employment, submitting that employment included all such acts as are reasonably incidental to a man's day's work;

    (ii) the appellant was engaged in action which was condoned by the employer as "custom and practice" and he therefore had the implied consent of the employer to use the machine.

10. The Department was invited to make observations in response to the appeal. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department opposed the application.

The tribunal's decision

11. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary evidence before it, including the Department's submission and the documents attached to it and a previous postponement decision. The appellant attended the hearing and gave oral evidence, represented by Mr Friel and accompanied by his partner. The Department was not represented.

12. The tribunal observed that there was no disagreement that there had been an incident on 28 June 2010, and that the appellant had suffered very serious injuries as a result. It identified the only issue in dispute as whether the appellant was acting in the course of his employment when he was injured. The appellant accepted that he was polishing a letterbox cover for himself, rather than for his employer. However, he submitted that he had the implied consent of his employer.

13. The tribunal disallowed the appeal, holding that there was a distinction between acts done under an obligation to an employer, and acts done merely with the employer's permission. It found that the appellant was not doing something for his employer or something reasonably incidental to his employment. v It found that the fact of the settlement of his civil claim against his employer, on terms which were confidential, was not of assistance to the tribunal.

Legislation

14. The legislation governing the present case is to be found in the Social Security Contributions and Benefits Act (NI) 1992. Industrial injuries benefits are established by section 94. This provides:

> "94.—(1) Industrial injuries benefit shall be payable where an employed earner suffers personal injury caused by accident arising out of and in the course of his employment, being employed earner's employment.
> …
>
> (3) For the purposes of industrial injuries benefit an accident arising in the course of an employed earner's employment shall be taken, in the absence of evidence to the contrary, also to have arisen out of that employment.
>
> …"

Submissions

15. On behalf of the appellant, Ms Lynn submits that the tribunal applied the wrong test in deciding whether or not the accident occurred in the course of his employment. In particular, she submits that the tribunal has erred in holding that there is a distinction between acts done under an

obligation to an employer and acts done merely with the employer's permission, relying on *Davidson v Handley Page Ltd* [1945] 1 All ER 235 where Lord Greene said: "The obligation of the employer extends to cover all such acts as are normally and reasonably incidental to a man's day's work".

16. Relying on the works of Lord Thankerton in *Canadian Pacific Railway v Lockhart* [1942] AC 591 at 599, she submits that:

> "the master is liable even for acts which he has not authorised, provided they are so connected with the acts which he has authorised that they might rightly be regarded … In other words a master is responsible not only for what he authorises his servant to do, but also for the way in which he does it".

17. Again, relying on Lord Clyde in *Lister v Hesley Hall Ltd* [2001] UKHL 22, at page 40:

> "An employer is liable for any injury which is sustained during the course of, and incidental to the scope of employment".

18. Ms Lynn submitted that the relevant test to be applied was whether the acts the appellant was engaged in were (a) part of his employment; (b) incidental to his employment; (c) done in furtherance of his employment; or (d) so connected with the acts that he is authorised to do that they might be rightly regarded as part and parcel of his employment. She made submissions relating to the evidence that was before the tribunal, noting that:

- The appellant was using a piece of work equipment (which was dangerous and ultimately condemned – referring to a consulting forensic engineer's report).

- The appellant had either express or implied permission to use the work equipment (in that a key had been left for him).

- The appellant was engaged in polishing, which was one of his work duties.

- The employer knew that non-work items were polished on the machine and permitted this to be done (referring to witness statements of former employees).

- What the appellant was doing at the time of his accident was accepted custom and practice and was therefore reasonably incidental to his employment.

19. Ms Lynn submitted that, had the employer walked in on the appellant whilst he was doing the acts that led to the accident, he would not have been criticised. She further submitted that the settlement of a civil claim against the employer was a relevant matter. At the time of the tribunal hearing this was subject to a confidentiality agreement, but this had since been waived by the employer for the limited purposes of the present appeal.

20. Mr Arthurs for the Department disputed some factual assertions. He submitted that it had not been established that, as the appellant was employed as a panel beater, using the polishing machine was normally part of his job. He acknowledged that it had been established that there was a culture of doing "homers" – pieces of work for personal benefit - on company equipment but submitted that this was not reasonably incidental to employment. Mr Arthurs submitted that the settlement of a civil claim for damages did not help to determine the present appeal.

21. Ms Lynn responded, submitting that the case law demonstrated a wide interpretation of what amounts to "acts … in the course of one's employment". She reiterated the relevance of the case law she had relied upon. She submitted that Mr Arthurs had cherry-picked facts to suit the Department's case. She submitted that Mr Arthurs had not responded to the argument around custom and practice and that it was clear that the appellant and the witnesses had access to the polishing machine, which was known to or condoned by the employer. In this sense she submitted that it was reasonably incidental to employment.

22. Mr Arthurs in turn sought to distinguish the relevant principles in social security law from principles of employment law or the law of tort. He accepted the principle that the fact that an employee was doing something for himself on his employer's time did not exclude the employee from IIB (referring specifically to *R(I)4/66*), so long as what he was doing was reasonably incidental to his employment. He denied cherry-picking facts and submitted that it had not been established that using the polishing machine was part of the appellant's employment or reasonably incidental to his employment.

Assessment

Case law on industrial injuries

23. The key question in the present case is whether the appellant, when he suffered his accident, was acting "in the course of his employment". The law of industrial injuries benefits has its roots in the Workmen's Compensation Acts and much of the old case law remains relevant.

24. In *Moore v Manchester Liners Ltd* [1910] AC 498, a sailor had gone ashore with, it appears, permission to buy soap and new clothes. Before returning to his ship he also visited some drinking saloons. When he was

crossing the ladder between the dock and the ship he fell into the sea and was drowned. Earl Loreburn, Lord Chancellor, said that:

> "An accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing".

25. This *dictum* has become part of accepted authority within related social security law (see Great Britain Commissioner Jacobs in *CI/1654/2008*). It offers relevant guidance on how the question of whether the claimant was acting in the course of his employment should be addressed. In cases such as the present one, the questions of when, where and what the claimant was doing when his accident occurred have to be asked.

26. The analysis of what the claimant may have been doing is further aided by the judgement of Hoffman LJ in the Court of Appeal in England and Wales in the case of *Faulkner v Chief Adjudication Officer* (reported as *R(I)8/94*). That case was addressed to the question of whether a policeman, hurt while playing a football match for a police representative football team, was injured in the course of his employment. He said:

> "An office or employment involves a legal relationship: it entails the existence of specific duties on the part of the employee. An act or event happens "in the course of" employment if it constitutes the discharge of one of those duties or is reasonably incidental thereto: *Smith v. Stages* [1989] AC 928. It follows that there are always two separate questions. The first involves deciding what the employee's duties were. As Lord Thankerton crisply put it in *Canadian Pacific Railway Co. v. Lockhart* [1942] AC 591, 600 "the first consideration is the ascertainment of what the servant was employed to do." The second question is whether the act or event was in the discharge of a duty or something reasonably incidental thereto".

27. By way of a gloss on what is meant by "reasonably incidental thereto", the Court of Appeal in England and Wales has also held that whether a man is acting in the course of his employment is not the strict test of whether he is at the relevant time performing a duty for his employer, "for he may be in the course of his employment when he acts casually, negligently or even disobediently, so long as it is something reasonable incidental to his contract of employment" (*R v Industrial Injuries Commissioner Ex parte AEU (No.2)* [1966] 2 QB 31).

The facts of the present case

28. The facts before the tribunal indicate that the appellant was injured at his place of work, but in an area where, his employer stated in a response to

the Department's request for information on the B176 form, "he had no authority to be". The employer stated that the accident occurred at 17.30hrs, although the appellant was expected to work that day only until 15.40hrs.

29. The employer indicated that the appellant was injured while polishing a brass letter box cover on a rotating machine polishing mop, that this was not authorised and that he was working on the letterbox for himself and not engaged in work for his employer. It was candidly accepted that the appellant was engaged in a "homer" when the accident occurred. However, it was submitted that the practice of employees using equipment for their own personal purposes was a recognised custom and practice in the particular workplace and was impliedly permitted by the employer.

30. It was not contended that the appellant was acting in the course of employment in the sense of performing actual employment duties. However, it was contended by the appellant that what he was doing at the time he was injured was something reasonably incidental to his employment.

31. Therefore it can be seen that the appellant was physically in the workplace using his employer's machinery. However, he was outside his normal working hours and he was carrying out a task which was not related to the employer's business of aircraft manufacture. He was engaged in what the employees referred to as a "homer". The question of whether he had permission for that was disputed.

The case law advanced by the appellant

32. The appellant relies on case law addressing the law of tort and, specifically, the vicarious liability of an employer for the actions of an employee. The cases relied upon included *Canadian Pacific Railway v Lockhart*. That was an action for negligence against an employee and his employer arising out of the employee's driving of a motor car in performance of his work duties. The employee had used his private uninsured vehicle to travel to a workplace contrary to company instructions that uninsured vehicles should not be used. Despite his disobedience to the company rule, the employer was held vicariously liable. In this context, what is known as the Salmond formula (from Salmond on Torts, 9th Edition, at page 97) was referred to by Lord Thankerton, namely:

> "It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts that he has authorised

> that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it… On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it. "

33. *Lister v Hesley Hall* was similarly addressed to matters of vicarious liability. In that case the question was whether the employer of the warden of a boarding school house was liable for the sexual abuse of boys in his care. In that context the question posed by the House of Lords was whether the acts of the employee were so closely connected with his employment that it would be just to hold the employers liable.

34. In *Mohamud v DN Morrisons Supermarkets* an employee working as an attendant in a petrol station attacked a customer for apparently racist motives. The UK Supreme Court upheld the general approach for vicarious liability on the part of the employer that there were two questions to ask: 1. What was the nature of the employee's job?; 2. Was there sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?

35. From a perusal of the relevant cases, it can readily be seen that the principles of vicarious liability are influenced by policy matters addressed to whether an injured third party may have a remedy against a company - which may have resources and relevant insurance - or only against an employee who may have neither. By contrast, the injured party in industrial injuries cases is the employee and not an outside third party. It appears to me that the policy considerations which are involved in vicarious liability are plainly not the same as in industrial injuries cases. Nevertheless, it is equally plain that there is some overlap and that, for example, Lord Thankerton was cited with approval in *Faulkner v Chief Adjudication Officer.*

36. The relevant principles - while similar - cannot be equated directly. I therefore approach the vicarious liability cases with some caution. I prefer to place direct reliance on case law deriving from the Workmen's Compensation Acts and the industrial injuries benefits scheme. These demonstrate that an employee may be in the course of his employment when he acts casually, negligently or even disobediently, so long as he is doing something reasonably incidental to his contract of employment. The key question remains whether what the particular appellant was doing when he was injured, with or without permission, was reasonably incidental to his contract of employment.

Conclusions

37. In the light of the relevant case law, I cannot fault the tribunal's approach as a matter of law. The appellant was not performing an employment duty under his contract of employment. He was outside his working hours. He was in his place of work, but in a part normally locked and inaccessible to him, and to which he had borrowed a key. The task that he was undertaking was entirely of a personal nature. The only factor connecting the circumstances to the appellant's employment was that he was using a piece of machinery which was owned by his employer.

38. Assuming that the appellant had permission to use the machinery, I judge that this situation would be akin to an employee being given permission to borrow a works van in the evening after work to move some household furniture. If he hurt his back in the course of loading the van, he could not say that he was acting in the course of his employment or doing something reasonably incidental to his employment. He was doing something entirely for himself. This would equally be so if the van's brakes failed through the employer's fault and he was injured in a resulting collision. His remedy in such a case would lie outside the industrial injuries scheme.

39. Examples have been given of customary use of the polishing machine which was unrelated to production, such as in finishing presentation shovels customarily made in the workplace as retirement gifts for managers or supervisors. There is a workplace context to such activity. I consider that, had an accident occurred in the polishing of such a retirement gift, it might reasonably be argued that this was something incidental to the employment of the person injured. However, this is not what happened. The appellant was not producing something relevant to his workplace or his employment but was - in the language sometimes used in such cases - "on a frolic of his own".

40. To establish that what he was doing when the accident occurred was "reasonably incidental to" his employment, I consider that the appellant would have to demonstrate that he was carrying out a task that was in some way connected to performing the duties of the job that he was paid to do. It was submitted by the appellant that the employer condoned, tolerated or turned a blind eye to the practice of "homers". While this was disputed, the appellant submitted that the settlement of the civil proceedings demonstrates that this was so. However, even if the employer directly authorised the appellant to carry out a "homer" on his own time, I do not consider that such permission could transform his actions into something reasonably incidental to his contract of employment.

41. More generally, proceedings based in negligence or breach of statutory duty do not read across directly into the matter that was before the tribunal. It is not necessarily the case that a settlement based on a compromise between the parties is definitive of the relevant factual

circumstances particularly, as here, where there was no admission of liability. With this in mind, I am satisfied that the tribunal did not err in its approach to the evidential value of the outcome of the civil proceedings. Nor do I consider that the outcome was directly relevant to its decision.

42. I feel naturally sympathetic to the appellant, who has suffered catastrophic injuries. However, it seems to me that the tribunal has not erred in law. The finding that the act of polishing a brass letterbox cover for himself after work was not something reasonably incidental to the appellant's employment is not an irrational finding. It is a finding made in accordance with the relevant law and does not involve any misdirection of law.

43. For these reasons, I must dismiss the appeal and uphold the decision of the appeal tribunal.

(signed): O Stockman

Commissioner

4 March 2021