[2022] JMSC Civ 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 02950

BETWEEN	**TERRY-ANN BISSICK**	**CLAIMANT**
AND	**CONVENIENT BRANDS LIMITED**	**DEFENDANT**

IN OPEN COURT

Ms. Krista-Lee Cole, Attorney-at-Law instructed by Jason Jones Legal for the Claimant

Ms. Jaavone Taylor Attorney-at-Law instructed by Nunes, Scholefield, DeLeon & Co for the Defendant

HEARD: July 27, 2022

Negligence – Employers Liability – Whether Claimant has established breach of duty of employer to provide safe system of work, sufficient staff and equipment – duty of claimant to provide sufficient evidence of breaches.

DALE STAPLE J (AG)

BACKGROUND

[1] In or about January 2015, or so the Claimant's Particulars of Claim goes, the Claimant, a former employee of the Defendant, was given a task to clean out a pan kept under the fryer at the Barbican Branch of a popular chain of restaurants known as Wendy's. The Defendant is the franchise owner and operator of the restaurant chain and this branch is operated by the Defendant company.

[2] The Claimant alleges that cleaning this pan caused her to suffer injuries and she has sued the Defendant as her employer for negligence arising from various breaches of their duty of care to her as an employer.

[3] The Defendant claims that they breached no duty of care to her as an employer and maintain;

(a) that the task was a simple one;
(b) the Claimant was given sufficient tools and training to do the job;
(c) and there was no need for more than one person to do the task.

[4] In the circumstances, they did not breach their duty of care to her. What is more, they allege that the injuries suffered by her could not have been caused by the task she was given to perform.

[5] The Court is therefore tasked with deciding whether or not the Defendant is liable to the Claimant in negligence for her injuries.

[6] Before proceeding with the substance of the matter, the Court had to do a bit of housekeeping. Having consulted with the parties and secured their consent, the Court made the following orders as being necessary for the continuation of this matter:

(i) The Defendant's name is corrected to be Convenient Brands Limited;

(ii) The Witness Statement of the Claimant (incorrectly headed as the Witness Statement of Everton Bygrave) is treated as though headed "Witness Statement of Terry-Ann Bissick"

[7] The Court is able to make the order in (i) above as it is simply to correct the name of the Defendant pursuant to Rule 20.6(2). It was simply a misnaming and there was never any doubt as to whom the Claimant was referring.

[8] As to order (ii) above, this was in my view another *bona fide* mistake and there was no harm in simply correcting an error on the face of the document.

FACTS

[9] The facts in this case are somewhat Spartan. The Witness Statement filed on behalf of the Claimant on the 8th February 2022 seems to have been drafted from a minimalist's perspective. Indeed, one is hard pressed to make a significant distinction between the Particulars of Claim and the Witness Statement.

[10] The Claimant says that in January 2015 she was working at the Defendant's premises at the Barbican Branch of their Wendy's franchise. She says an international inspection was to be done of the branch and she was given the task of cleaning a pan kept underneath what she called the "fries machine".

[11] We have no evidence of the size or dimensions of this pan. We have no idea of the material with which the pan is constructed. We do not know it's weight. All of these are material facts which were neither pleaded, nor even put into evidence. The significance of this will emerge later.

[12] Now the Claimant contends that the pan had never been cleaned before that day. But there is no evidence from her as to when the pan was first installed. She said she started working at that branch of Wendy's in December of 2015. That branch had been open from before the Claimant went there to work. So I cannot rely on such an assertion from the Claimant. She said the pan was in bad condition. There was no evidence from her as to what this meant. She said what she would usually do was change the filter pad.

[13] Having been instructed to clean the pan, she said that she was given a knife, degreaser and grill scrubber to carry out the task. She said she spent all day cleaning the pad. In cross-examination, she agreed that she meant pan. In cross-examination, she admitted to receiving some form of training, albeit not physical training. She admitted she got the necessary tools and cleaning implements and cleaning supplies to do the job on the day in question. So this undermines her

assertion in her witness statement that she did not. I find therefore that she did get the necessary tools and cleaning supplies for the job.

[14] She said she was not given proper training or provided with any proper gears. She conceded on the gears in cross-examination. She said the conditions were unsafe and there were not enough people to help her with this task. However, there was no description by her of the process of cleaning the pan that was utilised by her that would warrant such a statement. In fact, she agreed that the conditions were safe in cross-examination. There was no evidence from her that would suggest she needed more than one person to help her. So I find that there was sufficient staff to do the job and that the conditions were safe.

[15] She went to the Andrew's Memorial Hospital sometime after the incident and she saw a physiotherapist. There is a medical report presented from Dr. Adolfo Mena a consultant Orthopaedic Surgeon. There is no evidence that she saw a medical doctor at Andrew's Memorial Hospital or that she was recommended to see Dr. Mena by another physician. In fact, she conceded that she was sent to See Dr. Mena by her lawyer, who she admitted was not a physician.

[16] The Defendant called one witness. This person is Calais Hayden, the Human Resource Manager of Wisynco Group Limited (not the Defendant company) since May 2, 2022. She manages the human resource needs for Convenient Brand Limited, the named Defendant company.

[17] Among her responsibilities are the maintenance and review of employee records including documenting any training received, complaints, incidents, disciplinary breaches, promotions and so forth. She also has the responsibility for implementing and reviewing personnel policy including scheduling and safety practices in the company.

[18] She clearly was not around at the time of the incident, so her knowledge, she admits, only comes from the Claimant's file. She said the Claimant started working at the Barbican Branch on the 1st December 2014 when she had transferred from

the Liguanea Brach. Her list of duties included, assisting the register operator with filling orders, serving and bagging customer orders, greeting and assisting customers with special orders, cleaning the stove, grills, counters, fry station, filtering fryers, French fryers, chicken fryers, floors and restrooms among other things. This was not challenged in cross-examination and I accepted same as being true.

[19] It was communicated to her expressly that she would be required to bend, reach, wipe and carry items when cleaning and stocking and doing pre-close tasks. The witness stated that the cleaning activities are done before opening and closing daily. These cleaning activities are described by her as “non-technical” and are similar to ordinary household cleaning activities. No specialised skills, instruction or expertise is required in cleaning the equipment. None of this evidence was challenged in cross-examination and I accepted same as being true.

[20] Degreasers, brushes, rags, gloves, soap and other cleaning equipment are provided in store to clean the items. Now according to her, the cleaning of the filter pan for the fryer is a normal task assigned to crew members and it is a one person job. Again, this was not challenged by the Claimant in cross-examination. I accepted it as being true.

[21] Overall, I found Ms. Hayden’s evidence to be reliable and credible. There was no real challenge to it on cross-examination and I found her evidence to be the truth.

ISSUES

[22] The core issue in this case is whether or not the Defendant has breached their duty of care to the Claimant as an employer. Has she established, on a balance of probabilities, the several breaches she avers in her Particulars of Claim? She alleges as follows:

(i) That they failed to set up and implement a safe system of work.

(ii) That they failed to provide her with necessary tools/equipment for work;
(iii) They failed to provide sufficient workmen to perform the task.
(iv) They gave her an unreasonable task to carry out in a short space of time.
(v) They Exposed her to unnecessary risk of injury
(vi) They Ordered her to work in an area without training; and
(vii) They Failed to put proper safety signs in place.

[23] I will address each of these in turn in the analysis, but I must first examine the legal underpinnings of employer's liability.

THE LAW RELATING TO EMPLOYER'S LIABILITY.

[24] It is not disputed that the Claimant was employed to the Defendant. As her employer, therefore, the Defendant would owe a duty of care to the Claimant to have and maintain a safe place of work.

[25] The authority of ***Davie v New Merton Board Mills***[1] established that amongst the duties of an employer to an employee is the duty to take reasonable care for their safety in providing, amongst other things, a safe place of work and a safe system of work. An employer must also provide sufficient and proper tools for the employee to perform their task as well as a sufficient and sufficiently competent staff of workers to carry out the necessary tasks.

[26] The Claimant must satisfy the Court, that it was more likely than not, that the Defendant did not provide and maintain a safe system of work at branch and as such they breached this duty of care to her.

[27] Overall, the duty of the employer is simply a duty to take reasonable care for the safety of the employee. As Wolfe JA (Ag) (as he then was) said in the case of

[1] [1959] 1 All ER 340

United Estates Limited v Samuel Durrant[2], "This duty…was not an absolute one and could be discharged by the exercise of due care and skill."

[28] I look to the seminal case of ***Winter v Cardiff Rural District Council***[3]. In that case, Lord Oaksey set out the principle relating to the circumstances under which the duty of the employer would be properly discharged. He said as follows[4],

> *"In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. It is not easy to define these spheres, but where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workmen on the spot."*

[29] Therefore, the extent to which the employer is responsible for putting the system of work in place, is directly proportional to the complexity of the task to be performed. The simpler the task, the less direction required by the employer.

[30] The question of the nature and type of equipment required to complete a task, the training needed, the number of men to be assigned to the task and so forth all depend on the nature and complexity of the task being performed. Again, the simpler the task, the less will be needed. So it is clear therefore that each case will

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[2] (1992) 29 JLR 468 at 470
[3] [1950] 1 All ER 819
[4] Id at p. 822-823

and must turn on their own facts. This is because so much is dependent on what is to be done and by whom.

ANALYSIS

Failing to put in place a safe system of work

[31] The fundamental problem with the Claimant's case is the palpable lack of evidence of what exactly her task entailed on the day in question. There simply isn't a description of what she had to do to clean the pan and what she actually did in cleaning the pan.

[32] As a consequence, it is nigh impossible to determine whether the cleaning of the pan required the employer to devise a specific system for its cleaning. Let us compare the case of ***Channus Block and Marl Quarry Limited v Curlon Lawrence***[5]. In that case, the Respondent (the Claimant in the court below) had lost both his lower limbs during an unfortunate incident whilst cleaning out a cement mixer at the Appellant/Defendant's premises.

[33] This was a complex task. It involved more than one worker to clean the special cement mixing machine. It was recognised by the employer that the machine was dangerous and there was a safety system developed by the employer to ensure that the workers would not suffer injury whilst carrying out the task as they would have to go into the machine to use a sledgehammer to dislodge the hardened concrete.

[34] Another useful case for comparison is ***Walsh v Rolls Royce*** *(1971) Ltd*[6]. In that case, a very experienced worker and his equally experienced and competent supervisor were performing the very simple task of moving some ladders. During

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[5] [2019] JMCA Civ 3

[6] (Unreported) [1981] Lexis Citation 467

the course of moving the last ladder, the appellant Claimant was injured when the back of his head hit into a beam whilst he was walking backwards with the ladder. The two men had worked out a system for moving the ladders themselves. He claimed he was injured because his fellow worker had failed to warn him of the presence of the beam. The employer was found not liable in negligence. But on appeal to the Court of Appeal, the Appellant was successful, but only partially. He was held to be 50% contributory negligent.

[35] Watkins LJ aptly summarised the reasoning of the Court of Appeal for finding the Appellant contributorily negligent as follows,

> *"The arrangement was not a very sensible one. It was, for two grown-up, very experienced workmen, a task which they could have accomplished without any trouble whatsoever and without involving themselves in any kind of risk of injury; but for some reason best known to themselves they made difficult that which should have been simple. Unquestionably the plaintiff, in the circumstances, should have been able to look after himself, and the best way of doing that way by facing the direction in which he was going as he was re-entering the loading bay. So he was part author of a bad and rather silly system of work. Lord Oaksey, in Winter v Cardiff Rural District Council [1950] 1 All ER 819 at 822, [1950] WN 193 said:*
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> *"There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs".*
>
> *This was a simple task, the method of doing which could be safely left to the intelligence and experience of these two workmen. They did not, between them, do a very good job of it.*

[36] In the case at bar, the Claimant was required to clean a pan under the fryer. There is no evidence from her as to what this involved and what she actually did. What sort of pan was it? How heavy was it? What was the state of the pan when she took it out? What were it's dimensions? How did she take it out?

[37] All of this information and more would have been required by the Court to assess the task she was given. For saying you have to clean a pan sounds simple enough. However, the simplicity or complexity of a task depends on a multiplicity of factors.

[38] The Claimant, by not presenting the evidence, has made it so that the Court cannot say that the task of cleaning the pan was so complex and risky that it was the duty of the Defendant to put in place a system to clean same. In other words, she would have had to put evidence before the Court to put the issue into the employer's sphere of discretion rather than in her's.

[39] So concerning the failure of the Defendant to put in place a safe system of work, I am of the view that this ground of negligence has not been established. There is simply not enough evidence that the task was so complex or inherently dangerous that it was for the employer to put in place a system to clean the pan.

The Other Alleged Breaches

[40] The other alleged breaches of duty can all be treated in the same manner. There is simply no evidence that the tools she admitted she was given, and which I find she was given, were inadequate to do the job of cleaning the pan.

[41] There is no evidence that she needed extra help from even one other worker to clean the pan properly. There is no evidence that the task of cleaning the pan was so difficult or complex that it could not be completed in a reasonable time by a single person. The Claimant avers that the Defendant gave her an unreasonable task to perform in a short space of time. There is no evidence from her that she was given a specific time to complete the task assigned. In fact, in her evidence, she said she was given the whole day. She even got a break for lunch. So the court could not determine whether this was a reasonable time to complete cleaning the pan.

[42] She avers that she was exposed to risk. There is no evidence to support this either. She would have needed to provide evidence that cleaning the pan was something risky, or that the special circumstances under which she was cleaning the pan created a foreseeable risk.

[43] An illustration of this is provided by the case of ***King v Smith et al***[7]. In that case, the plaintiff was a window cleaner employed by the first defendant, whose rule book for window cleaners provided that windows above six feet from the ground must be cleaned, as far as possible, from the inside or by sitting on the window sill, and that, if any part of the window could not be cleaned except by standing on the sill, the cleaner must secure his safety belt rope, if possible, to a structure able to support his weight should he fall, or to use fitted hooks where specially provided. The plaintiff was cleaning a second-floor window, in an office building occupied by the second defendant, which had no attachment for a safety harness, and, because there was a desk against the window, the plaintiff could not clean it by sitting on the sill. He tried to open the window from the top to clean it from inside, but the sash stuck and he went out onto the sill to clean it instead. Having cleaned the window, he reached inside to try and get back into the room but his hand slipped on a piece of paper pinned inside the window frame. He fell 35 feet and suffered serious injuries. In the plaintiff's action in negligence the judge gave judgment against the first defendant for 70 per cent. of the plaintiff's damages to be assessed, having found contributory negligence of 30 per cent. The 1st Defendant appealed. On appeal to the Court of Appeal it was held that the first defendant was in breach of his duty of care to the plaintiff in failing to instruct the plaintiff to clean from inside windows more than six feet from the ground which, if in proper working order, would have been capable of being so cleaned and not to go out on the window sill unless there was safe anchorage for a harness; and that employers who could have protected themselves by explicit instructions but did not do so must bear the major share of the blame and the court would not interfere with the judge's apportionment.

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[7] [1995] ICR 339

[44] So the above case illustrates that there was an inherent risk in cleaning a window of such a height. So much so that it required the employer to give **specific** instruction to the employee for that dangerous task.

[45] In this case, there is no evidence that cleaning the pan is a risky thing in all the circumstances. So the Claimant has not established, in my view, that they exposed her to an unnecessary risk.

[46] The training complaint is, again, not founded on evidence. This again comes back to a deficiency in pleadings and evidence. There is nothing to say that the cleaning of the pan required specific training. According to the evidence of the Defendant's witness, which I accept and find as true, the cleaning of the pan is part of her ordinary, routine work and requires no more than what would be required to clean such things at home. So then, unless the Claimant would have put evidence of the task being of such a nature, that special training would have been needed to complete it, then I do not find that this complaint about training has any merit.

[47] Again, the duty of the employer is simply to do what is reasonable. According to Lord Tucker in the case of ***General Cleaning Contractors Ltd v Christmas,***[8] "Their only duty is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation."

[48] The other alleged breaches are not established for the same reason; lack of sufficient evidence.

The injury to the Claimant – no link to the incident

[49] I will discuss this area as it was raised by the Defendant in their submissions. I agree with their submissions that the Claimant has not established a nexus

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[8] [1953] AC 180 at p. 195

between the injuries complained of and the incident the subject of the Claim. Again, this comes back to a deficiency in pleadings and evidence.

[50] Here we have a Claimant that has given us no description of **how** she cleaned the pan. We have no evidence of what was in the pan when she was cleaning it or its general state. We do not know if she was scouring it; how vigorous was the movement; was such movement reasonably required in all the circumstances; was it so heavy she had to exert more than reasonable force to manipulate it whilst cleaning it; we have nothing.

[51] In the absence of these basic facts, a Court would be hard pressed to make any finding that her shoulder injury was as a consequence of cleaning the pan. So yes, there is evidence in the form of the incident report as testified by the Defendant's witness that the Claimant complained of pain after cleaning the pan, but we have no idea if her complaint was reasonable or legitimate as there is no evidence from her to support her complaint.

[52] What is more, there is a bit of an unresolved discrepancy as to when she first complained. She said in cross-examination that she complained the day after she started feeling the pain. But in her history to the physiotherapist, that would have put the incident in February of 2015. In her evidence, she said it happened in January of 2015.

[53] By the time the therapy was completed in July of 2015, the therapist said that she was basically resolved. There is no evidence as to the reason or even the necessity for the visit to Dr. Mena. There is no nexus between the incident of cleaning the pan and the injuries observed by Dr. Mena. An over 2 year gap exists between the date the Claimant said she was injured and the date she visited Dr. Mena. In those 2 years, there is no evidence she continued receiving any treatment from any physician or therapist that would have justified her going to see Dr. Mena.

[54] Accordingly, the Court concludes that there is a lack of an evidential nexus between the injuries complained of and the incident giving rise to this claim.

CONCLUSION

[55] In my view, the evidence is just lacking. The Claimant has not provided sufficient evidence of the nature of the task she was to do for the Court to make any proper determination as to whether the system was adequate or not, the tools were sufficient, the persons assigned to do the task were appropriate, the training adequate and so forth.

[56] In the circumstances, I am not satisfied, on the balance of probabilities, that the Claimant has established that the Defendant has breached their duty of care to the Claimant. There is simply not sufficient evidence from the Claimant to show that the Defendant has failed to take reasonable steps to provide a system that was reasonably safe having regard to the dangers necessarily inherent in the operation. I have no idea of what was involved in the cleaning of the pan to come to any such conclusion.

DISPOSITION

1. Judgment for the Defendant;

2. Costs to the Defendant to be taxed if not agreed; and

3. Defendant's Attorneys-at-Law to prepare, file and serve this Order by July 29, 2022 by 3:00 pm.

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D. Staple, J (Ag)