EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO. EE 04/1997

PARTIES

A Female Employee

and

Three Named Respondents

File No. EE 31/94

1. Dispute

1.1 This dispute concerns a claim by a female employee of the respondents that an act perpetrated against her by a male employee constituted discrimination against her in terms of section 2(a) of the Employment Equality Act, 1977 and contrary to section 3 of the Act.

2. Background

2.1 The respondents accept that an act perpetrated against the claimant by a male employee occurred on 16 May, 1994 and that she has the right to have the matter considered under the Employment Equality Act, 1977.

2.2 The claimant states that she verbally reported the incident on 2 June, 1994 to the local Assistant Manager. On the 7 June, 1994 she submitted a written complaint to the local Manager (first named respondent). On 11 June, 1994 the perpetrator was presented with the report and was asked for his explanation. He declined to respond to the report or to a subsequent letter on the question

of discipline, on the basis that they not meet the seven day time limit set in the disciplinary code. On 7 July, 1994 the local Manager submitted a written report by fax in the matter to Headquarters (second and third named respondents). The report included a recommendation to the third named respondent that the seven day rule be set aside so that perpetrator be compelled to respond to the allegations against him. On 19 July, 1994 the employee faxed a detailed report of her complaint to the second named respondent with a request that it be brought to the attention of the third named respondent.

2.3 The first named respondent asserts that he never received a response to the report of 7 July, 1994, despite his best efforts, until 22 May, 1995. The response was to the effect that his recommendation on the seven day rule could not be favourably considered. The second named respondent states that its case file indicates that the decision in the matter was conveyed much earlier than claimed by the first named respondent but it does not indicate who was informed of the decision.

2.4 In November, 1994 the employee referred the dispute to

the Labour Court. The Labour Court referred the case to an Equality Officer for investigation and recommendation. The employee originally claimed, in addition to section 2(a) of the Act of 1977, that she was also discriminated in terms of section 2(b) and (c) of the Act, however, these claims were subsequently not pursued.

2.5 The Equality Officer, subsequent to the receipt of written submissions from the parties to the case, held a joint hearing. Arising from that hearing further written submissions were received from the respondents and the claimant's representative. The second and final hearing, at which the parties to the dispute were legally represented, was held on 15 August, 1996. As the parties to the dispute wish to remain anonymous, the Equality Officer agreed that they would not be named in the recommendation.

2.6 As the Equality Officer considered, in the course of his investigation of this case, that he would have to address the question of vicarious liability he invited the parties to submit their written arguments on this issue. He received the written views of the respondents

in the matter but he did not receive any arguments in writing from the claimant's representative despite various assurances, including at the second hearing, that he would take up the invitation do so.

3. THE ISSUE

3.1 The respondents' representative accepts that an act perpetrated against the claimant by a male employee did occur on 16 May, 1994 and that she has the right to have the matter considered under the Employment Equality Act, 1977. He concedes that the act might be considered sexual harassment but contends that it would more accurately be described as an assault. The claimant's representative submits that the act perpetrated against her did amount to sexual harassment and thus she was unlawfully discriminated under the Act.

3.2 I have given careful consideration to the evidence available on the incident and I consider that regardless of whether or not the act constitutes assault it did amount to less favourably treatment of the claimant because of her sex. The act perpetrated against the claimant as described by her is at paragraph 6.2, and my views on this aspect of the dispute are at paragraphs

6.3 and 6.4 of my conclusions.

3.3 The respondents do not concede that they are collectively or severally vicariously liable for what occurred. As it appears to me that the core issue I must address and make a recommendation on here is the question of vicarious liability I propose not to outline in detail the submissions from the parties other to present their respective views on vicarious liability.

VICARIOUS LIABILITY

4. <u>The Claimant's Case</u>

4.1 The claimant's representative argues that vicarious liability is not an issue here as there was unlawful discrimination against the claimant within the meaning of discrimination in the Employment Equality Act, 1977. He further argues that the Act of 1977 was introduced to protect parties discriminated in the workplace. He asserts that the Labour Court has long held that the denial of freedom from sexual harassment in the workplace is in breach of the 1977 Act.

4.2 In support of the case that the respondents' unlawfully discriminated against the claimant her representative

refers to the code of practice "Measures to Protect the Dignity of Women and Men at Work", published by the Department of Equality and Law Reform. He cites paragraph 3.3 from the chapter entitled "The Law and Employer's Responsibilities" wherein it is stated:

> "Employers have a duty to seek to ensure that the working environment is free from sexual harassment. Thus, in sex discrimination cases alleging sexual harassment the case is brought against the employer and not the perpetrator."

4.3 The claimant's representative contends that the incident, giving rise to this dispute, is now being called assault by the respondents in order that their case on liability falls within the Costello J. High Court judgment in the Health Board and B.C. and the Labour Court. He suggests that the B.C. differs from the present case in that the High Court was of the view that the perpetrators in B.C. committed an aggravated assault.

4.4 The claimant's representative submits that common law cases cited by the respondents have no relevance here

as the claimant has the statutory protection of the 1977 Act. In relation to the High Court judgment in B.C. he observes, if one is to accept the respondents' arguments on it, then the effect of the judgment is to nullify the Employment Equality Act. He submits that if the Equality Officer finds that the application of the concept of vicarious liability poses a problem in the present claim then he should have a **Case Stated**.

5. The Respondents' Case

5.1 The respondents point out that there is no allusion to the concept of vicarious liability in the Act of 1977. They submit that an employer is liable for the wrongs of his employee but only if such wrongs are committed in the course of the employee's employment. They further submit that if the unauthorised or wrongful act of the employee is an independent act, the employee has gone outside the scope of his employment. In the case here, the respondents assert, no liability is attached to them because the act did not occur in the course of the male employee's employment.

5.2 In support of their case the respondents cite case law and the cases cited included the following:

Murray -V- Minister for Finance, Ireland and the Attorney General (unreported)

The Supreme Court in April 1992 held that a Garda who was involved in an accident while driving a patrol car in the opposite direction to the station he was attached to, 20 minutes after he was due off duty, was not acting in the course of his authority or duty.

Hough -V- Irish Base Metals Ltd. (unreported)

The Supreme Court held that an employer was held not to be vicariously liable for an employee's "larking", when the plaintiff was injured when trying to escape from a gas fire mischievously placed beside him by the employee.

Irving & Irving -V- Post Office (1987 IRLR 289)

In this English case, a postman-sorter wrote an offensive remark on a letter addressed to a couple of Jamaican origin. It was held that since the substance and purpose of what was written was unconnected with the performance of his duties, the Post Office was held not be vicariously liable.

5.3 The respondents considers that the case of The Health Board -V- B.C. and The Labour Court (1994 E.L.R. Volume 5 page 27), holds the answer to the question of liability. They assert that the issue of vicarious liability fell for consideration in circumstances where the employee's complaint under the Employment Equality Act, 1977, related to violent and unprovoked sexual assault which can be properly described as an indecent assault. The High Court, they further assert, held that the employer in the B.C. case was not vicariously liable for the attack in question.

5.4 It is apparent, the respondents advise, that the decision in the B.C. case is apposite in the instant case in that the incident complained of by the claimant:-

"(a) Was of extremely short duration and was virtually impossible to anticipate or indeed legislate for. In essence, there were no practicable steps which could have been taken to ensure that this type of behaviour did not occur. It is important to stress that the Appellant does not contend that she had

previously been exposed to a discriminatory work environment.

(b) Did not occur in the course of the male employee's employment while it constituted an assault in that it placed the Appellant in fear and was not an act which was either authorised or condoned by the Local Manager.

(c) Was an isolated incident in that there were no previous incidents of harassment."

5.5 The respondents submit that the Labour Court's finding, that the employer was vicariously liable for the behaviour of the Head Chef in A Company and A Worker (EEO 3/95), which was subsequent to the B.C. judgment, has no relevance here. They advise that in that case the Labour Court held that the company having given the Chef responsibility over the workplace, it must accept the consequences as employer if he abused his position of responsibility, which the Court was satisfied that he did. The Court added the actions by the Head Chef were clearly committed within the scope of his employment.

6. Conclusions of the Equality Officer

6.1 It is not disputed by the respondents that an act perpetrated by a male employee against the claimant, as described by her, did occur on 16 May 1994. The claimant's representative argues that the incident constituted discrimination against her on grounds of sex within the meaning of Section 2(a) of the 1977 Act and in breach of Section 3 of the Act. The respondents do not contest the claimant's right to have the matter considered under the Employment Equality Act, 1977, however, they dispute that they are collectively or severally liable for what occurred.

6.2 The claimant advises that, on 16 May 1994 after a work out in the gym, while on her lunch hour, she went to the ladies locker room to have a shower. She describes the incident, thus " While having my shower a plastic bag containing a large amount of cold water was thrown in at me directly while in the shower. I immediately turned around. I was in shock and found myself standing in a full frontal nude position in front of a male employee. He was laughing at me and after a few moments he ran out of the female locker room."

6.3 I consider that the question I must first decide is whether the act perpetrated against the claimant comes within the meaning of discrimination as defined at Section 2(a) of the legislation. After I have addressed that question, and as it is accepted that the incident complained of did occur, I will then address the question of vicarious liability in the context of Section 3 of the Act.

6.4 The Act of 1977 provides at Section 2 that:

> *"..... discrimination shall be taken to occur....*
>
> *(a) where by reason of his sex a person is treated less favourably than a person of the other sex."*

I am satisfied having regard to the evidence available to me on the incident of 16 May 1994, that the claimant was "treated less favourable than a person of the other sex" in that the treatment that she was subjected to was of a type that a man would not have been vulnerable to the same treatment. Accordingly, I am satisfied that the claim comes within the scope of Section 2(a) of the Act.

6.5 It is contended on behalf of the claimant that the discrimination against her is in breach of Section 3 of the Act in relation to conditions of employment. The Labour Court held that in a Garage Proprietor and A Worker (EEO 02/85) "Freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect" and it went on to state in its Order that "The Court, will accordingly, treat any denial of that freedom as discrimination within the terms of the Employment Equality Act, 1977." I am satisfied that the claimant in the present case was entitled to conditions of employment free from the type of treatment meted out to her, however, the question I must now decide is whether or not the employer is liable for the denial of that freedom.

6.6 In the present case the respondents do not accept that they are collectively or severally vicariously liable for the act perpetrated by the male employee. The claimant contends that vicarious liability is not an issue here in that the purpose of the 1977 Act is to provide protection to those discriminated by reason of their sex (or marital status) in the workplace.

6.7 I should state here that I invited both parties for their written views on vicarious liability and that I received the respondents views in the matter but did not receive any written views from the claimant's representative despite various assurances, including at the second hearing, that he would take up the invitation to do so. The claimant's case as contained in paragraphs 4.1 to 4.4 is my understanding of the views expressed by her representative, at the hearing in August, 1996, on the question of liability.

6.8 The respondents representative submits that the act perpetrated against the claimant might be described as sexual harassment, however, he considers it was assault. He points out that in order for an assault to occur, a physical act does not have to be carried out, even though there was a physical act here i.e. the throwing of the bag of water, the fact that a person is put in fear, as also occurred here, is sufficient. The claimant's representative contends that the incident is now being called an assault in order that the respondents' case on liability falls within the Costello J High Court 1994 judgment in the Health Board and B.C.

and the Labour Court case (E.L.R. Volume 5 page 27).

6.9 In support of their contention on liability the respondents cite common law and equality law cases. I have given these various cases careful consideration, however, I propose here to address the High Court case of The Health Board -V- B.C. and the Labour Court and the Labour Court finding in A Company and A Worker (Order No: EEO395), which cases in my opinion are the most salient here as both were considered in the context of the Act of 1977.

6.10 Costello J. in his judgment in the B.C. case stated that "in the absence of express statutory provision the law in this country ....is perfectly clear ..... an employer is vicariously liable where the act is committed by his employee within the scope of his employment". Mr. Justice Costello described the act perpetrated on the fellow employee as sexual assault and he went on to state that "I cannot envisage any employment in which they engaged in respect of which a sexual assault could be regarded as so connected with it as to amount to an act within its scope."

6.11 The Labour Court in A Company and A Worker, which case

was subsequent to the aforementioned High Court judgment, found that "The actions committed by the Head Chef were clearly committed within the scope of his employment in that he was responsible for the supervision and management of the staff, and he chose to exercise those responsibilities in such a manner as the Court has found amounted to sexual harassment."

6.12 The High Court and subsequently the Labour Court, in the two cases cited above, asked themselves the same question i.e. was the act committed "within the scope of his employment."

Costello J held, as outlined at paragraph 6.10, that he could not envisage any employment where an act such as that in the case before him could be regarded as being an act within the scope of employment.

The Labour Court came to the conclusion on the evidence before it, as outlined at paragraph 6.11, that the actions of the Chef did came within the scope of his employment because of the manner in which he exercised his managerial and supervisory responsibilities.

In the instant case I cannot find that the act perpetrated against the claimant was anyway connected with the male employee's employment nor can I find, as he had no supervisory or responsibility over her, that it was improper exercise of managerial control over her.

6.13 I note the claimant's representative observations on the application of the concept of vicarious liability in the context of equality legislation, however, an Equality Officer is obliged to adhere to points of law as established by Courts of jurisdiction. It may be useful to state that there are no statutory provisions to allow him/her to have a **Case Stated**.

6.14 In reaching my conclusions in this claim I have taken into account the submissions both oral and written on all the issues of the case. Having regard to the views that I have expressed in the preceding paragraphs I cannot find that the respondents are collectively or severally vicariously liable for what occurred. Accordingly, I find that the claimant has no entitlement, under the Employment Equality Act, 1977.

7 Recommendation

7.1 In view of my conclusion in the preceding paragraphs, I find that the three named respondents did not collectively or severally discriminate against the claimant contrary to the provisions of the Employment Equality Act, 1977.

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Jim Clerkin,
Equality Officer,

13th March, 1997.