SUMMARY

2019/46 Robbery attack: the responsibility of the employer? (SI)

A worker was performing regular work tasks at their workplace when an attempted robbery took place. The worker suffered serious facial injuries as a result of an assault by one of the robbers and they filed a lawsuit against their employer claiming the latter was fully liable (both objectively and subjectively) for the work accident entitling them to reimbursement of all damages resulting from the accident. The question that was raised was whether the employer can be held subjectively liable for an accident at work despite the fact that it had taken the necessary measures foreseen and/or imposed by law to prevent such accidents.

Facts

In the evening on the day of the robbery attempt the worker, who was employed as a cashier in a market, was performing usual work tasks in front of the cash register. Robbers entered the market and demanded money from the cashier. Since the cash register did not open and a janitor noticed the robbers, they endeavoured to escape. When doing so, one of the robbers hit the cashier on the front side of the head with the handle of their firearm, causing severe facial injuries to the employee.

The market itself was placed in a slightly remote area however, despite that, there was no security guard or active surveillance system there. These were the main arguments asserted by the worker as to why the employer should be held liable for the damage caused.

In court the employer argued that it had taken many precautionary measures to reduce occupational hazards and accidents at work, such as are prescribed by law. The employer also

educated all workers on how to perform their job safely and how to act in the event of a robbery. It also issued a manual in which it was clearly stated that in case of life threatening situations all employees must abandon any action that could endanger their lives.

The worker claimed both material damage (loss of profits) and non-pecuniary damage for the injuries suffered to body and health. The court of first instance decided in favour of the worker's claim regarding subjective liability of the employer. The worker was granted pecuniary compensation for the damage arising from the accident at work. The court of second instance confirmed the ruling of the court of first instance. The employer filed for a revision procedure at the Supreme Court and succeeded: the latter disagreed with the first and second instance courts, providing clarification on the application of the provisions on subjective liability and unlawful conduct of the employer regarding work accidents.

Legal background

Under the Slovenian Code of Obligations, whoever causes damage to another is obliged to compensate for it, unless they prove that the damage occurred without their fault. Under the Employment Relationship Act, it is the obligation of the employer to compensate for the damage caused to the worker at work or in connection with work, unless the employer proves that the damage was caused without its fault. Slovenian law for the most part follows the objectives of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (the 'Directive'). During the legal procedure, the employer asserted that it had provided all the necessary protection, supervision and acted with necessary diligence in relation to security at the workplace (all in accordance with the objectives of the Directive – higher degree of protection of its workers), so as to exclude its liability. In order to find the employer subjectively liable, the court had to establish that damage indeed occurred (to the worker), that the conduct of the employer was unlawful, that there was a causal link between the occurrence of the damage and the unlawful conduct of the employer, and that the employer was liable.

Judgment

The court of first instance had already excluded the possibility of strict (objective) liability of the employer, which may result out of the nature of the activity and is not based upon the negligent or intentional actions of the employer. Objective liability may arise from an activity of the employer which is dangerous in itself, or if a non-dangerous activity becomes, under certain circumstances, dangerous and hazardous. The court emphasized that the employer may be (objectively) responsible for damage caused by extraordinary, unusual, abnormal dangerous activities or occurrences, but the court also established that this was not the case

here. The worker emphasized that the given circumstances such as inactive video surveillance and absence of security guards made this work dangerous, but the court did not follow such argument. The court stressed that despite the above, the risk of injury (harm, damage) was no greater than normal and therefore the objective liability of the employer was not established.

The second question that the court of first instance considered was the question of subjective liability – can the employer be blamed for acting negligently? The verdict of the court of first instance was that the employer was held liable, despite the fact that the employer took the necessary measures, required by the Directive and national law, and that the robbery was conducted by a third party whose actions the employer could not control. The decision was substantiated mainly on the basis that workers were made familiar with the rules of conduct during robberies only orally and not in writing. Hence, the employer could and should have adopted additional measures to prevent the danger of robbery (for example: providing physical protection or video surveillance). Since the employer abandoned being fully diligent, its negligence was the basis for its responsibility. The weight of the court's opinion raised the question that arises under Paragraph 2 of Article 5 of the Directive. The latter contains the employer's choice to engage competent external services or persons (in this case: providing physical protection) but not the obligation to do so. Furthermore, even if the employer engages competent external services or persons, this does not discharge it from its responsibilities in this area. In this case, the court of first instance (and also the court of second instance) established responsibility for omission of a measure, which is not obligatory under the Directive itself. However, in this case in addition to all provided measures, the employer also consulted workers and allowed them to take part in the discussions on questions relating to safety and health at work, resulting from Article 11 of the Directive. Also, each worker was sent for practical safety and health training, where they were able to learn about the various situations that may occur during a work process. The judgment of the second instance court fully concurred with the decision of the first instance court.

The Supreme Court overruled the judgments of the courts of first and second instance and held that both decisions were, in respect of establishing subjective liability of the employer, incorrect.

The Supreme Court stressed that the employer proved that it did not violate any specific obligation arising from the Health and Safety at Work Act and also regarding safety against robberies. The unlawful conduct of the employer is one of the four elements necessary in order to establish subjective liability, but there was no unlawful action on the part of the employer here. Furthermore, subjective liability could be established only if the damage

results from the employer's direct actions (the robbery is an external, autonomous event unrelated to the employer) or if it emanates from a failure to comply with the obligations regarding similar third party conduct. The Supreme Court stressed that the employer could have done more to prevent the robbery, but that was not its obligation according to the law. The Supreme Court also emphasized that liability cannot be generally established based on the fact that 'the employer could have done more to prevent the unlawful conduct of a third party'.

Commentary

In our view this verdict represents an important legal development from a domestic law perspective. The court of first instance may have been overly reliant on the duty of the employer to ensure the safety and health of workers in every aspect related to the work (Article 5 of Directive), but did not take into account that the robbery is an exceptional event, the consequences of which could not have been avoided despite the exercise of all due care. Paragraph 4 of Article 5 of the Directive leaves the Member States with the option to exclude or to limit the employers' responsibility where occurrences are beyond the employers' control (due to unusual and unforeseeable circumstances), or could not have been avoided despite the exercise of all necessary measures (due to exceptional events). Even though the Directive was transposed into Slovenian national law by the Health and Safety at Work Act, the latter does not explicitly specify the exclusion or limitation of employer liability in such cases.

The Supreme Court, in our opinion, correctly overruled the judgments of the courts of first and second instance. The lower instance courts did not attach enough importance to all the employer's accepted safety measures and also neglected the fact that there was no other (clear or implied) obligation under the law for the employer to fulfil. Based on the circumstances of the case, it is always possible to argue that some action by the employer was not taken or that it would be reasonable if the employer took certain other or additional measures. But that would then mean that an employer can never be 100% diligent. Even more, if that were the case, legal certainty would be interfered with and the employer would always be (at least partially) liable, meaning that its responsibility would convert – become objective and ever present.

For the future, similar cases should be assessed in light of the stance taken here by the Supreme Court, so that employers cannot be held generally liable for situations which pose the same amount of risk as situations each individual faces in everyday living.

Comments from other jurisdictions

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the legal background is a bit different, so that the above-mentioned problems usually will not arise here. Although, the liability of employers and employees does also regularly occupy the German labour courts.

In Germany, the employer is usually only liable – if at all – for material damage to the employee, but not for personal injury. This is due to the fact that in Germany employees are insured by law by having statutory accident insurance and claims for personal injury against the employer and colleagues are excluded if the accident is an insured event. This is based on the regulations of the Seventh Social Code, the Book of Statutory Accident Insurance (*Siebtes Sozialgesetzbuch*, the 'SGB VII'). Section 2(1) No. 1 SGB VII stipulates that employees are covered by accident insurance. Moreover, Section 104 SGB VII transfers the employer's liability for personal injury (including not only medical costs, continued payment of wages and funeral costs, but also compensation for pain and suffering) to the statutory accident insurance for the most part. Prerequisites for the liability privilege of Section 104 SGB VII are the following:

an accident suffered by an employee during or because of the performance of work;
occurrence of personal injury; and
no intentional damage by the employer.

For material damage, the following applies: in principle, the employer is liable for material damage to the employee if it has at least negligently caused the damage. If the employee uses personal belongings for business purposes and these are damaged while performing their work, the employer shall also be liable for such damage regardless of fault.

In the present case, the employee was injured while they were performing usual work tasks, so that the incident would be an insured event covered by accident insurance under German law. The fact that the injury was caused by a third party is irrelevant as any damage suffered during the work is covered. Therefore, even injuries caused during a robbery must be compensated by the accident insurance. An exception applies only if the offence was not committed in connection with the employment relationship but because the offender had a personal motive (Federal Social Court, judgment of 19 December 2000 – B 2 U 37/99). Moreover, neither a possible infringement of protection rules nor a deliberate breach of protection obligations on its own leads to the assumption that the employer has intentionally caused the work accident, so that Section 104 SGB VII may not apply. The employer's intention must also refer to the occurrence of an injury to the employee, which means that the employer must at least have

recognized and approved the possibility of the injury. In the present case, the employer did not have to assume that it was likely that damage would be caused by a robbery, so that the employee would not have any claim for personal injury against their employer under German law.

Italy (Caterina Rucci, Katariina's Guild): Under Italian law, the employer would be liable for damages insofar it is not able to prove that all necessary safety measures were taken. The notion of 'necessary' tends to be extended also to robberies, insofar they are usual or at least not impossible in the sector concerned.

Basically, this is an almost objective liability, since the employee is obliged to provide extensive evidence, made more onerous if and to the extent robberies are – as they are in banks and shops – quite usual.

The safety obligations are therefore much stricter, and proportionate, and must be adequate to the specific risk of the sector and industry.

Subject: Health and safety, Miscellaneous

Parties: Unknown

Court: Supreme Court, Employment/Social Department (*Vrhovno sodišče, Delovno-socialni oddelek*)

Date: 14 October 2015

Case number: VIII Ips 186/2015

Internet publication: http://sodnapraksa.si/?doc-2015081111389691

Creator: Vrhovno sodišče, delovno-socialni oddelek (Supreme Court, employment/social department)
Verdict at: 2015-10-14
Case number: VIII Ips 186/2015