

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

(CIVIL SUIT)

**BRITISH VIRGIN ISLANDS
BVIHCV 2009/0390**

ANDRE PICKERING

(By his Litigation Friend Cisne Benjamin)

Claimant

And

BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION

Defendant

Appearances:

William Hare of Forbes Hare for the Claimant

Willa Tavernier, Akilah Anderson of Webster & Co. for the Defendant

Judgment: (2012: May 29th, July 5th 25th)

(Negligence - Employers liability for accidents in workplace – employee sustaining electric shock in workplace – whether employer failed in duty of care to employee to provide safe system of work- whether employee contributed to accident by failing to follow instructions)

[1] **Joseph Olivetti J:-** Electricity, a natural phenomenon, has been put to good use ever since it was discovered and harnessed by humans in the 18th century but it is a force which despite its enormous potential for good can be equally harmful. On 5 June 2007 Mr. Andre Pickering was doing maintenance work on electrical switches at the power station of the defendant, British Virgin Islands Electricity Corporation, “BVI EC” when he sustained a massive electric shock and resulting severe personal injuries. He claimed that BVI EC was responsible for the accident but BIVEC denied liability. Efforts were made to settle the matter but with no success and so on 11 November 2009 Mr. Pickering filed this suit. BVI EC denies liability or alternatively alleges that Mr. Pickering contributed to the accident by his negligence.

[2] **Issues**

[3] The court is only concerned with the issue of liability as a bifurcated trial was prudently ordered by Master Mathurin on 20 February 2012 at case management conference. The key

issues here are whether BVIEC provided a reasonably safe system/place of work and whether Mr. Pickering contributed to the accident.

[4] **The Law**

[5] This is not in dispute. An employer's obligation in the workplace is well established. He/ she has a duty to use reasonable care to provide a safe place of work and a safe system of work, in short to take reasonable care for the safety of his/her workmen or women. Denning LJ in **Clifford v Charles H. Challen & Son Ltd** [1951] 1 KB 495 at 497 summed it up nicely in his inimitable way when speaking of the case of a workman who contracted dermatitis at work from the use of a known dangerous substance. The learned judge explained: - **"The question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself."**

[6] And on contributory negligence see also Denning LJ in **Jones v Livox Quarries Ltd** [1952]2 QB 608 p.615- **"Although contributory negligence does not depend on a duty of care it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that if did not act as a reasonable prudent man he might be hurt himself; and in his recokonings he must take into account the possibility of others being careless"**.

[7] **Findings of Facts**

[8] The main facts are largely undisputed. The court heard from Mr. Pickering and on his behalf, Mr. Alton Vanterpool (Sugar)a co-worker at the time of the incident and Mr. Eric Donovan another employee of BVIEC. Four witnesses testified for BVIEC- Mr. Henry Creque, the Deputy General Manager, Mr. Avery Percival, the foreman at the time, Mr. Trevor Gumbs and Mr. David James the latter two being co-workers of Mr. Pickering that night.

[9] BVIEC is a statutory corporation whose main business is the generation and supply of electricity to the Territory of the Virgin Islands. As is not unusual in the Anglophone Caribbean in colonial days such essential services providers were given monopolies and that is still largely the position with BVIEC. BVIEC's main power station is at Long Bush, Tortola. Mr. Pickering was a junior cable joiner at all material times with BVIEC. He had been employed with BVIEC for approximately 9 or 10 years prior to the accident. He is now 45 years old. In the early hours of 5 June 2007 Mr. Pickering and a team of 4men supervised by Mr. Percival were engaged in cleaning and maintaining certain electrical feeder switches at Long Bush.

These feeder switches in question were contained in a row of cabinets similar to large gym lockers. Each cabinet has two compartments, an upper which contains the bus connections and the control cubicle and a lower which houses the switchgear. Two foreign consultants were also present and were engaged in maintaining the breaker switches which were contained in the lower compartments to do this the breaker switches had to be “racked out” and dealt with outside the cabinets.

[10] Mr. Pickering had performed the task of cleaning and maintenance of the busbar and the feeder switches numerous times before without any mishap, however, never whilst under the supervision of Mr. Percival.

[11] Mr. Pickering said that he together with Mr. Vanterpool and Mr. James had cleaned the bus bar at the back of the cabinets after Mr. Percival had shut down the current to the busbar and given them the all clear. Then he moved to the fifth cabinet and waited on the all clear from Mr. Percival who apparently had difficulty in turning off the current. According to Mr. Pickering he had to seek help from Mr. Creque via telephone. Mr. Percival left the room then returned, said the switches were dead but only tested the switches at each end of the row, the first and the fifth. Mr. Pickering cleaned the fifth switch without incident. He then moved to the fourth switch, the lower compartment but before his screw driver, interestingly, the tool he was working with, even connected with the bushings on the switch there was a huge explosion, he was thrown and he received a massive electrical shock. He had no protective clothing, gloves or footwear. There is no dispute that the fourth switch was the Spare Road Town Feeder switch a live switch carrying some 7000 volts of electricity. Mr. Pickering was fortunate to survive despite sustaining severe injuries.

[12] The main factual controversy centered on the instructions given by Mr. Percival to Mr. Pickering and the rest of the team that early morning. Mr. Pickering testified that he and the team were instructed to clean five feeder switches and the bus bar that night. In this he is supported by the evidence of Mr. Vanterpool who also testified likewise.

[13] However, it is BVIEC's case that Mr. Pickering exceeded his instructions as the men were only supposed to clean the busbar and three of those switches, that the Spare Road Town Feeder switch and the West End switch were not to be cleaned and they knew that the power was left on in those switches.

[14] I accept that Mr. Percival was competent to do the isolation and supervise the men on this job. However, I also accept that Mr. Pickering had never worked with him before in that position and was uneasy about his ability to isolate the current that night. Mr. Percival said that on that night he called the men together with 2 foreign Tamco engineers and discussed how they were going to proceed with the work and the switching. His witness statement is far from clear as to what precise instructions he gave as to the scope of the works.

[15] He testified that he consulted with the shift supervisor, Mr. Raymond Turnbull and then he isolated the work area i.e. turned the power off. He then tested all the connections in the open cabinets of the switchgears that were supposed to be worked on and grounded all connections

to demonstrate to the entire team that the switchgears were electrically dead and that the cabinets containing the two live switchgears remained closed. He said that Mr. Gumbs and Mr. Vanterpool with the assistance of the TAMCO engineers were cleaning the racked out breakers and Mr. James and Mr. Pickering were cleaning the control cubicles and the switchgear compartments, by wiping them with a piece of cloth. Interestingly, he made no mention of Mr. Pickering using a screwdriver to perform his work. And he did not see the accident but only witnessed its aftermath.

[16] Mr. Gumbs testified that he could not remember how many switches Mr. Percival told them were not to be worked on but he remembered that that included the Spare Road Town Feeder switch and the West End Switch which remained live. He said all the breaker switches were racked out included those from the cabinets not to be worked on and that those cabinets were closed and screwed shut with screws that could be opened by hand, no tool required, and the others were left open. He said that they were to clean both the switches that were taken out and the cabinets where they came from and that Mr. Pickering was cleaning the inside of the cabinets.

[17] And, Mr. Creque who was not present when the accident happened, testified that he had discussed the work earlier that day with Mr. Percival and they decided on a step by step safety procedure to ensure that the work area was safe. He said that it was his understanding that the work that night was to be limited to the bus bars only, that is, the wide flat copper bars situated in the rear top portions of the switch gear cubicles on the switches on the right hand side of the switchboard. Work was also to be performed on the withdrawn circuit breakers –testing cleaning and any other required maintenance. He testified further that on the night in question none of the workers should have been in either the top or bottom compartment of the switchgear cabinet of either the Spare Road Town Feeder switch or the West End Switch.

[18] Having considered the evidence I am inclined to accept that Mr. Percival's instructions were not clear. (indeed having heard the evidence of Mr. Percival, Mr. Creque and Mr. Gumbs I am not sure myself exactly what the scope of work was supposed to be). I find that Mr. Pickering understood that he was to clean the busbar as well as the inside of all the cabinets and that it was not abundantly clear to him which switches were live and which were not by actual physical demonstration. I do not accept as learned counsel for the BIVEC submitted based on para. 8 of his witness statement that he admitted that two switches were live when he began to do the work as to my mind having regard to the whole of his evidence this speaks to when he actually arrived at work and what he witnessed at the time.

[19] Furthermore, in my judgment the method of work was unsafe. I accept Mr. Pickering's evidence as this has not been refuted that in the past they were required to clean all the switches. Therefore, it is not far-fetched to expect that in that case a worker could quite inadvertently follow the established routine. Therefore, simply screwing the cabinets containing the live switches is not adequate to protect workers from the risk of being electrocuted inadvertently especially taking into account the proximity of the two compartments, the top of which carried a 12 volt current which was not harmful to the workers. (Indeed Mr. Pickering's evidence which was not refuted was that all the cabinets were unscrewed when he commenced to do the cleaning and that he did not unscrew any of them). More was required of

BIVEC if they were to meet their obligation at common law to provide a reasonably safe place and method of work. Indeed, it is telling the precautions that BVIE put in place after the accident including gloves, protective clothing and marking off of dangerous zones with yellow caution tape. This demonstrates without a doubt that such precautions were reasonably necessary and that they were lacking that night.

[20] I also note Mr. Pickering's evidence which went unchallenged that he was not given any protective clothing and that the instrument he used was a screw driver. No reasonable employer would allow its employees to carry out such potentially dangerous work in such a manner.

[21] In addition, as supervisor that night Mr. Percival failed to supervise properly as (1) he ought to have noticed that the cabinets with the live switches were open and have them secured again or seen when Mr. Pickering approached the live Road Town Feeder switch and stopped him. He did not observe any of these things and therefore his supervisory functions was inadequate to provide a safe system of work. I remark his candid evidence that he was sitting in a chair in the doorway facing out of the room at the time of the accident and had been doing so for some fifteen minutes prior thereto.

[22] Even if contrary to my findings Mr. Percival did tell the team that they only had to clean 3 switches and Mr. Pickering misunderstood his instructions this was not a deliberate case of doing what he ought not as in **Jones v. Livox quarries**, as no one person would deliberately make contact with a live switch bearing 7000 volts using a screw driver and I do not find that a misunderstanding of his instructions if that did happen amounted to him not taking reasonable care for his own safety as there is no indication that he was not paying attention to Mr. Percival or that he understood and flouted the instructions. The fact remains that even if he had misunderstood the instructions the accident would not have occurred if he was wearing protective clothing and had a safe tool rather than a screwdriver and the live cabinets were locked. I find no contributory negligence on his part. In all circumstances in my judgment BVIEC is 100% liable for the accident and resulting injuries to Mr. Pickering as it failed to take basic measures to ensure a safe system of work and its failure was the primary and operative cause of the accident.

[23] Accordingly, judgment is given for Mr. Pickering together with prescribed costs to be based on the award of damages to be made upon due application for assessment. I note Mr. Creque's evidence about BVIEC's reluctance in the first case to have this matter go to trial and the efforts BVIEC have made to assist Mr. Pickering and I trust that this assessment will not be too protracted or costly having regard to the length of time that has elapsed since the accident.

[24] I must thank counsel for their written submissions which the court found invaluable.

Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands