

HEALTH SERVICE EXECUTIVE VJ.J.O'HARA

The defendant has been charged with selling tobacco to a person under the age of 18 years, contrary to the provisions of S.3(1) of the tobacco (Health Promotion and Protection) Act, 1988 as amended by S.2 of the Health (Misc. Provisions) Act, 2001.

FACTS

The defendant is the proprietor of retail premises in Foxford, Co. Mayo. On 15th Nov. '06, in his absence, one of his employees sold a packet of cigarettes to a 16 year old female customer, who was a volunteer minor acting on behalf of the Health Service Executive, hereinafter referred to as H.S.E. The employee asked the 16 year old for indication. None was produced and the transaction was completed.

No prosecution has issued against the employee.

The H.S.E. had received no previous complaints in relation to the subject premises and no previous inspections had been carried out therein.

It is common case that the defendant had established a comprehensive and stringent system of training for his employees with particular emphasis on the prevention of the sale of alcohol or tobacco to minors.

It is also common case that the employee, who completed the sale in the instant case, was fully aware of her employer's policy to uphold the law in this regard and further was also aware that a breach of said policy would result in instant dismissal of an employee.

SUBMISSIONS

Mr Gordon for the Defence referred the court to the provisions of S.3 (3) of the Tobacco (health Promotion and Protection) Act, of 1988 and submitted the defendant

was entitled to the benefit of the defence provided thereby. The defendant, he argued, as proprietor, had taken all possible precautions to ensure that no tobacco was sold to minors. He had established a strict system of training for his employees and all of them knew that such an offence would result in automatic dismissal. This, he argued, was the maximum possible safeguard open to a proprietor and must be considered to be the 'reasonable steps' as envisaged by the legislators, to assure himself that the purchaser of tobacco products was over 18 years of age.

Mr Gordon further submitted that the prosecutor, i.e., the H.S.E. was in breach of the Tobacco Control complaint protocol drawn up in November 2003, by the Office of Tobacco Control in accordance with its statutory requirement to so do, under S.10 of the Public Health (Tobacco) Act of 2002.

In the first place, he argued, the volunteer minor, when asked for proof of identity did not admit that she did not have one which would show she was over 18 years of age. By impliedly suggesting that such proof was elsewhere and/or obtainable she was also, he argued, impliedly suggesting that she was, in fact, over 18 years of age. At Appendix D of the Tobacco Control Protocol, in its instruction for volunteer minors, the minor is advised to state his/her correct age, if asked. These instructions are notably, silent as to the recommended reply, should the volunteer be asked for identification. It is commonly accepted, he argued, that when proof of identification is sought, in these circumstances, it is, impliedly, proof that the holder has achieved his/her majority.

Further Mr Gordon suggested, the H.S.E. was also in breach of the protocol by failing to meet its own criteria for generating a list of target premises, as referred to at Para. 2,p.4 therein. In this connection he referred to the findings of Murphy J. in the case of *Syon, Hewitt and McTiernan*, (High Court, 10.11.06) in which the Office of Tobacco Control was afforded the status of "*amicus curiae*". In particular, he referred to Murphy J.'s consideration of the significance (sic) of the Protocol, viz, "the Protocol in providing for the generation of a list of target premises as provided for in Para. 2 of the Protocol should do so by reference thereto". No such list exists in this H.S.E. area and, he argued, the targeting of the small town of Foxford, Co. Mayo, on this particular day, was unfair and in breach of the spirit and intent of the Protocol.

Mr Durcan, for the Prosecution, submitted that the defendant is solely and ultimately responsible for the acts or omissions of his employees, acting in the course of their employment. The employee in this case asked for but was not shown proof of the purchaser's age. She, in her own words, "took a chance" for which her employer is vicariously liable.

Mr. Durcan contended that the employee's request for identification was something quite distinct from a question as to the age of the volunteer minor. Proof of identity, he argued, could have many forms, (e.g. it could be a passport) and need not necessarily be proof of the holder's having reached the age of 18 years.

He described the Tobacco Control Protocol as a code of best practice. It did not have the force of statute. Even if the prosecution were to accept that, in the instant case, there may have been non-compliance with the Protocol, this would not render its case fatally flawed.

He confirmed that his instructions were that different procedures were followed by the H.S.E.'s in different areas, depending on circumstances such as availability of a minor volunteer. In some cases, inspections were followed by warnings only; in others, they resulted in immediate prosecution.

THE LEGISLATION

S.3. of the Tobacco (Health Promotion and Protection) Act 1988 as amended by S2 Health (Misc Provisions) Act, 2001:

1. Any person who sells, offers to sell or makes available in relation to the sale of any other product, any tobacco products to a person under the age of 18 years, whether for his own use otherwise, or who sells to any person, acting on behalf of a person under the age of 18 years, any tobacco product, shall be guilty of an offence and shall be liable on summary conviction, to a fine not exceeding €2000.
2.

3. Where a person is prosecuted for an offence under this section, it shall be a defence for him or her to establish that he or she had taken all reasonable steps to assure himself or herself that the person to whom the tobacco products were sold, offered for sale or made available had attained the age of 18 years.

The Public Health (Tobacco) Act, 2002.

1. Established the Office of Tobacco Control
2. Gave prosecutorial powers to the O.T.C and to the H.S.E.
3. Required the O.T.C. in cooperation with the H.S.E. to coordinate and implement a national inspection programme to ensure compliance with the provisions of the Act.

S.9.(1) There is hereby established a body to be known as the Office of Tobacco Control (in this Act referred to as the “Office”) to perform the functions assigned to it by this Act.

S.6.(1) Summary proceedings for an offence under the Act may be brought and prosecuted by the office

S.10.(1)(j) Among the general functions of the OTC is the following:

The Office shall: coordinate and implement a programme for the inspection of all premises in which tobacco products are, manufactured, stored, subjected to any process or sold by retail, and all premises to which the public have access, either as of right or with the permission of the occupier or person in charge of the premises concerned for the purposes of ensuring that there is compliance with the provisions of this Act.

FINDINGS

The offence of selling tobacco to a minor contrary to S.3(1) of the Tobacco Act, 1988, as amended, is not, in my view, one of strict liability. S.3(3) of the same Act provides that it shall be a defence for a defendant to prove that

he/she had taken all reasonable steps to assure himself/herself that the purchaser had attained the age of 18 years.

The language so used may be contrasted with that used in the Intoxicating Liquor Act, 2000, S.14(1)(b) of which provides that the only defence for the defendant is to “prove” that the person in respect of whom the charge is brought produced to him or her an age card relating to that person or if the defendant is charged with permitting another person to sell or deliver int. liq. Contrary to either of these subsections, to prove that an age card was produced to that other person.

The I.L.A. 2000 provides that the production of an age card is the only defence open; The tobacco Act 1988 provides that “reasonable steps” to assure the seller of the purchaser’s age may be a defence.

The I.L.A. 2000, however, also provides for the specific offence of permitting another person to sell or deliver intoxicating liquor to a minor. The tobacco Act does not so distinguish between employer and employee.

S14(2f)(b) of the I.L.A 2000 also provides, interestingly that when minors are found on licensed premises during extended hours, it shall be a defence for the defendant to prove “that he used all due diligence to prevent underage person from being admitted to the premises in respect of which the exemption order is granted or that the person produced an age card”.

At first sight S.3(1) of the Tobacco Act might suggest the reasonable steps referred to therein are personal to the actual seller herself. Simons in his article “Criminal Liability for Environmental Pollution”, Bar Review 3(a) 1998 p.p.5&6, which was opened by the Defence, considers the question of vicarious liability where an offence admits, as in the instant case the test of reasonable care. He argues that acts to be considered are those of the employer and not any negligent acts of his employee which he had taken reasonable care to prevent. He argues further that an employer could only be

convicted of an offence of this nature where the employee committed that offence with the consent or connivance explicit or implied, of the employer.

Neither the Tobacco Act 1988, nor any of the subsequent amending acts of 2001, 2002 and 2004 provides for an offence of “causing or permitting the sale” of tobacco products to under-age persons. This is in direct contrast with the provisions of the I.L.A. 2000 in relation to the sale of intoxicating liquor to under-age persons, which does so provide.

In a criminal prosecution of this nature the relevant statute should, in my view, be interpreted strictly. While there is no doubt that the employee in this case, was negligent and failing in her statutory duty, her actions were a direct and flagrant flouting of her employer’s training and instructions. She was not acting as his agent, and, in my view, the provisions of S.3(1) of the Tobacco Act 1988 as amended cannot be interpreted so as to impute her actions to her employer.

In light of my findings above it may be unnecessary to consider the arguments of the Defence in relation to the Protocol of the Office of Tobacco Control, hereinafter referred to as O.T.C. I have however considered the two alleged breaches of the Protocol and whether those breaches, if found, are fatal to the prosecution’s case.

I have described the Protocol as a soft law instrument. It has been drawn up by the O.T.C. in accordance with a statutory requirement imposed on it by S.10 of the Tobacco Act, 2002, which Act also gives prosecutorial powers to the O.T.C. and the H.S.E. The protocol has been described by Murphy J. in *Syon* case (*supra*) as not having the force of statute. He does, however, at P. 17 of the judgment, describe it as providing “a basis by which reasonable grounds for suspicion can be established”.

At p.21, Murphy J further finds:

“it seems to the court that the best practice of listing target premises is by way of random testing prior to prosecution. S10 of the 2002 Tobacco Act provides

for the implementation of a programme for inspection. Such programme should have regard to the list of targeted premises and as a result of survey as provided”.

At p.23 of the judgment Murphy J. held ‘*inter alia*’ that it was “relevant” that the prosecutor (in that case the Health Board) had departed from the strict terms of the Protocol in that no list of target premises had been generated as envisaged in Para. 2 of the Protocol and that if such a list had been generated no evidence had been adduced to indicate that the defendant premises would have been put on it by reference to any of the criteria laid down.

In the instant case I am satisfied that there has been a breach of the protocol in that no list as provided for has been drawn up. It seems to me that this list is the first and essential step in the O.T.C’s national programme. The criteria for inclusion in this list are unclear. The lack of clarity in Para. 2 of the Protocol is unhelpful in this regard.

Having found that there is a breach of Protocol in this respect I do not need to consider the undoubtedly interesting argument in relation to the question as to identification being comparable to a question as to age. It is noteworthy, however, that the Protocol is silent as to directions for the minor volunteer if asked for identification.

I now consider whether or not breach of Protocol is fatal to the H.S.E prosecution herein.

Although there may be a certain degree of ambiguity in the questions posed and replies given in the judgment of Murphy J. in the *Syon* case (*supra*), I am satisfied that the learned judge has found that the Protocol is the preliminary framework for establishing a database of premises which are reasonably suspected of breaches of the Tobacco legislation and which will be the target premises as referred to therein.

I note at P.1 of the Protocol the description of itself as an “essential element of a viable, consistent and sustained approach to compliance building and enforcement throughout the country” and further at p.3 No. 6 the following direction “if the EHO (i.e. Environmental Health Office) intends to recommend prosecution they (sic) should refer to the Tobacco Control Prosecution Protocol”. I note also at p. 7 that recommendations to prosecute premises are based on an assessment of the nature of the offence, history of the premises and the efforts made by the owner/operator/person in charge of the premises to comply with the legislation.

The Protocol’s essential purpose, it would seem, is to create procedures for test purchases carried out by volunteer minors. These test purchases are almost exclusively the bases of prosecutions under Tobacco legislation. The Protocol’s importance cannot be undervalued. It establishes the means by which a prosecution may be instigated,. In the circumstances I consider that breach of Protocol is tantamount to taint of process in a criminal prosecution.

For this reason and because I do not believe that the legislation provides for vicarious liability in the circumstances outlined in this case I dismiss the Prosecution.

(Signed by Mary C Devins)

District Court Judge

Ballina Court

10/07/2007