Employment and Corporate Law issues in Personal Injury Litigation

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EMPLOYMENT LAW FOR PERSONAL INJURY LAWYERS

RES JUDICATA/ISSUE ESTOPPEL

The Problem

1. Employment Tribunal litigation regularly throws up difficulties with respect the effect of earlier judgments because of the overlapping jurisdictions of the tribunals and civil courts. Generally ET claims have to be presented within three months of the date of the act complained of and are, frequently, resolved within a year of the act complained of. Clearly this is a much shorter period of time than many PI claims.

2. An issue often arises about whether a claim for personal injury is estopped if the matter has been part of a claim in an employment tribunal.

3. It is well established that decisions of the employment tribunal can give rise to an issue estoppel, abuse of process or res judicata argument on behalf of the affected party: Green v Hampshire County Council [1979] ICR 861, Ch. D.

4. However, the employment tribunal derives its power from statute and it has no inherent jurisdiction to hear claims that fall outside of the causes of action it is empowered to hear.

5. Section 3(2) of the Employment Tribunals Act 1996 states:

> **3 Power to confer further jurisdiction on employment tribunals**
>
> (2) Subject to subsection (3), this section applies to –
>
> (a) a claim for damages for breach of a contract of employment or other contract connected with employment,
>
> (b) a claim for a sum due under such a contract, and
>
> (c) a claim for recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,
>
> if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.
>
> (3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.

6. This point is further underlined by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) which states:

> **3 Extension of Jurisdiction**
>
> Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries)…

7. The exclusion is of wide application. Clearly it would apply where the Claimant is alleging the Respondent was at fault and that fault led to the injury, but also it would seem to apply where there is a no-fault policy of insurance or contractual benefit in place which is dependant upon the Claimant showing they were the subject of a personal injury: Flatman v London Borough of Southwark [2003] EWCA 1610 where the Court of Appeal found that s3(3) excluded the tribunal's jurisdiction in relation to a claim by an employee about his employer's refusal to pay him a personal injury allowance scheme.

8. Similar reasoning is likely to apply in respect of claims for long-term disability and permanent health-insurance schemes.

9. The rationale behind the exclusion appears to be that personal injury claims involve consideration of expert medical evidence. Since the enactment of the Disability Discrimination Act 1995 (and now the Equality Act 2010) there appears to be less force in the argument that the assessment of such medical evidence is not suitable for a three person tribunal.

10. However, there is one very important respect in which damages for personal injury can be claimed and compensation by an employment tribunal. This is where the personal injury is claimed as a head of loss in discrimination claims but only where the injury is caused by the discrimination (Sheriff v Klyne (Lowestoft) Ltd [1999] IRLR 481).

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006

What is TUPE?

11. At common law a contract of employment cannot be unilaterally transferred from one employer to another without the consent of the employee, and termination of the contract of employment with the original employer will amount to a dismissal. Therefore a statutory "bridge" was needed to protect employees in situations where there was a change in the identity of the employer.

12. The Transfer of Undertakings (Protection of Employment) Regulations 1996 ("TUPE") are aimed at achieving this protection.

13. The concept of the relevant transfer is at the heart of TUPE. It is what makes the obligations bite. Without a relevant transfer there are no obligations on transferor or transferee.

Why is TUPE important for PI Lawyers?

14. In short there are costs in getting the identity of the Defendant wrong. Any insurers will be unimpressed having paid for litigation up until the point that the claim has to be either discontinued against the named defendant or is struck out; this in turn could result in a professional negligence claim against the advisor particularly if the Claimant is prevented by expiry of the limitation period to commence fresh proceedings.

GENERAL POINTS

Not Mutually Exclusive

15. Although there are two wholly separate types of transfer: the "economic entity" and "service provision change" they are not mutually exclusive. Any given transaction can be one, other or both. Indeed, one of the reasons why the SPC was introduced into the 2006 Regulations was because of the confusion that arose in the case la under the 1981 Regulations as to when an SPC could be a relevant transfer.

Public and Private Sector

16. Regulation 3(4)(a) makes it clear that transfers to and from the public sector are covered.

International Aspects

17. TUPE can apply even of the transfer is governed or affected by the law of another country or the employment of the employees in the undertaking transferred is governed by the law of another country (Regulation 3(4)(b)).

18. A relevant transfer can occur even where the persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom (Regulation 3(4)(c)).

A Series of Transactions can amount to a relevant transfer

19. R3(6)(a) states a transfer can be affected by a series of transactions. The ECJ had little difficulty in finding that where a lease was terminated and then granted to a new business there was a transfer from the old employer to the new tenant of the lease as long as the economic entity retains its identity: Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1990] IRLR 315, ECJ.

ECONOMIC ENTITY TRANSFERS

20. These are contained in Regulation 3(1)(a) which applies where there is:

> "a transfer of undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity"

21. Accordingly there are four questions that this definition requires to be answered:

(a) What is the "economic entity"?
(b) Immediately before the transfer was it situated in the United Kingdom?
(c) If so, was there a transfer to another person?
(d) If so, did it retain its identity after the transfer?

What is the "Economic Entity"?

22. Defined in regulation 3(2) as:

> "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary"

23. This is a question of fact. In Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice [1997] ICR 662, the ECJ held that an "economic entity" refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. Thus the activity in itself is not sufficient alone to amount to an entity. So look for physical (workforce, premises, operating systems and procedures, customers) and intangible (goodwill and IP rights) assets.

Was the Entity Situated in the United Kingdom immediately before the transfer?

24. R3(1)(a) only applies to transfers taking place within the United Kingdom and to transfers from inside the United Kingdom outwards. It would not apply to transfers into the UK, although if this was from an ARD country then presumably there would be some sort of regime akin to TUPE that applied.

Transfer "to another person"

25. Article 1.1(a) of the ARD states:

> "This Directive shall apply to any transfer of an undertaking...to another employer as a result of a legal transfer or merger"

26. Regulation 3(1)(a) does not add anything to this definition the DTI's "Employment rights on the transfer of an undertaking: a guide to the 2006 TUPE Regulations for employees, employers and representatives" ("the DTI Guide") clarifies that the identity of the employer must change.

Share Purchases Generally not Covered.

27. Thus, neither the ARD or Regulations would seem to apply to a purchase of shares, as the identity of the employer remains the same. The change in ownership of the employer brought about by the share sale has no impact on the contractual

relationship between the employer and employee.

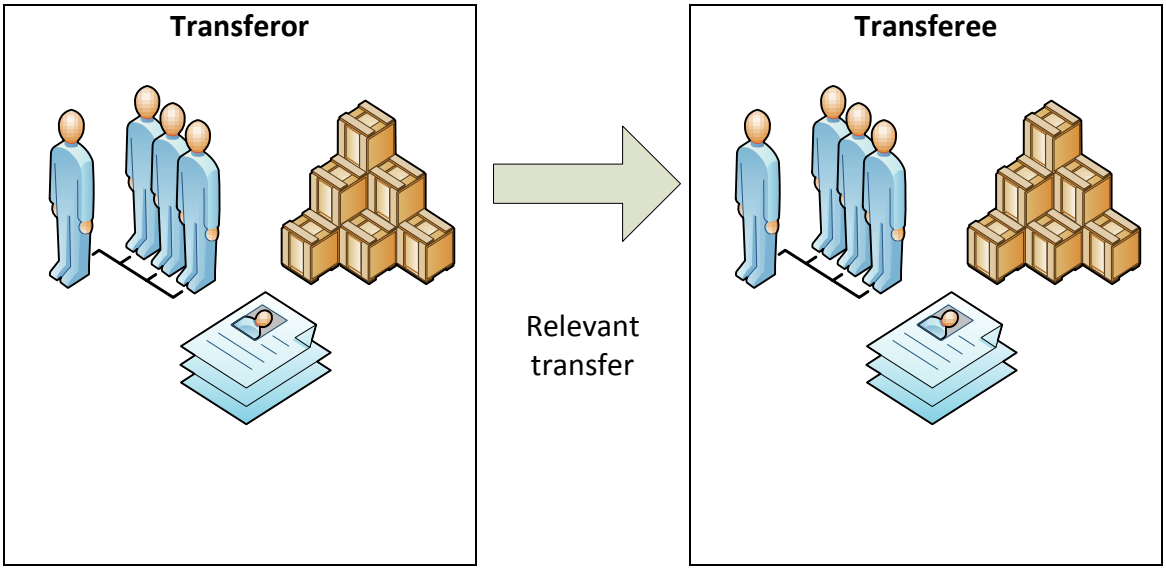
Examples of transfers

28. There have been economic entity style relevant transfers as a result of:

    a) Reorganisations within groups of companies: Allen v Amalgamated Construction Ltd [2000] ICR, 436, ECJ.
    b) Court Orders: Berg and another v Bresselsen [1990] ICR 396, ECJ.
    c) Regulatory Interventions: the Law Society's intervention into a firm resulted in a relevant transfer: Rose v Dodd [2005] ICR 1776, CA.
    d) Companies Struck off the Register: Charlton and another v Charlton Thermosystems (Romsey) Ltd [1995] IRLR 79, EAT.

Did the Economic Entity Retain its Identity?

29. If the entity does not retain its identity then TUPE has no application. This is a question of fact.

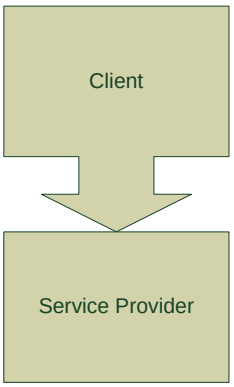


SERVICE PROVISION CHANGES ("SPC"'s).

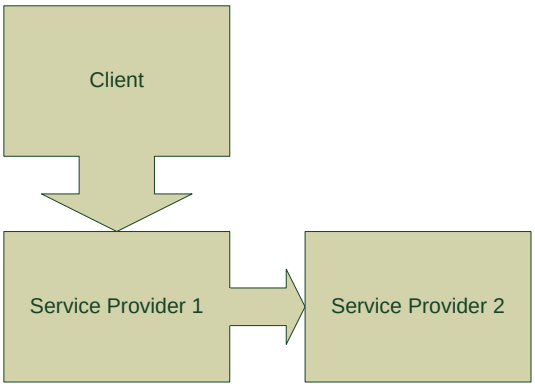
30. Regulation 3(1)(b) of TUPE 2006 introduces the "service provision change" a "wholly new statutory concept" (Judge Burke QC: Metropolitan Resources v Churchill Dulwich Ltd (in Liquidation) and others [2009] IRLR 700 at para 27).

Types of "SPC"

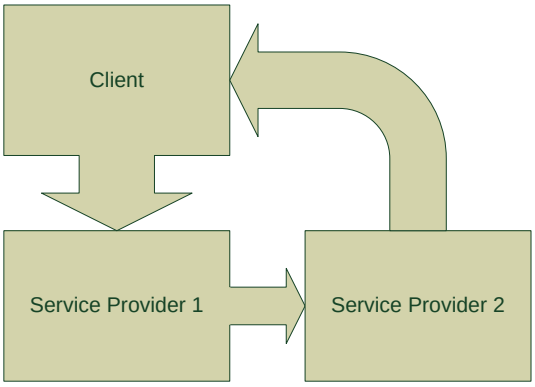
31. Regulation 3(1)(b) contains three types of SPC:



Initial outsourcing: Client → Service provider, "first generation."



Re-tendering: Service Provider 1 → Service provider 2 "Second generation tendering"



Contracting in: Service Provider → Client

32. If regulation 3(1)(b) applies then the tribunal will progress to consider regulation 3(3): Metropolitan Resources.

3(3)(a)(i)

"Immediately before the transfer involved an *organized group of employees* situated in Great Britain which has as its *principal purpose* the carrying out of the *activities* concerned on behalf of the client"

Organised Grouping of employees

33. Whereas r3(1)(a) requires an organised grouping of resources, r3(1)(b) requires "organised grouping of employees" includes individual employees pursuant to r2(1).

"Principal purpose"

34. The term "principal purpose" is aimed at excluding the provision of services to clients in general rather than a specific client (e.g. a travel agents). The BISS Guidance makes it clear, "principal" does not equate to "exclusive".

"Activity"

Identifying the activity

35. The term "activity" is not defined in the Regulations but must be approached relatively broadly: Metropolitan, but as the EAT noted in Kimberly Group Housing Ltd v Hamberly [2008] ICR 1030 (at paragraph 28) the identification of the "activity" needs to be done with care. If the definition is too narrow then an SPC may not arise as the alleged transferee may be carrying out a different activity.

Assessing the Activity in the hands of the Transferee

36. When assessing the activities the tribunal should not be distracted by:

> "minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required….*the Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor*. The answer to that question is one of fact and degree…"
>
> Per HHJ Burke QC
> Churchill Dulwich v Metropolitan Resources
> [2009] IRLR 700 at para 30

3(3)(a)(ii)

"The client intends that the activities will, following the transfer be carried out by the

transferee other than in connection with a single specific event or task of short-term duration."

37. This, effectively inserts into the SPC regulation the principle established in Ledernes Hovedorganisation v Dansk Arbejdsgiverforening [1996] IRLR 51, ECJ, that the transferring business must be stable and capable of continuation.

38. It appears that the requirement of "single specific event or task of short term duration" is meant to be interpreted as cumulative, that is for the transfer to fall outside of r3(3)(a)(ii) it must be both "single specific" and "of short term duration": BISS Guidance.

3(3)(b)
"the activities do not consist wholly or mainly of the supply of goods for the client's use."

39. The BISS guidance makes clear with a particular example the fine lines that are drawn: the SPC will not cover the provision of sandwiches to a client for the selling onto the client's staff, but will cover the running of the client's canteen.

40. Again careful analysis of what amounts to an "activity" can often affect whether the SPC provisions apply or not: for example if Food CO Ltd supplies sandwiches to Client Co but also repairs Client Co's sandwich display case: if Client Co then terminates this contract and enters into an identical contract with New Co is there an SPC? Arguably there are two "activities": the sandwiches and the repairs. The former is excluded from TUPE by 3(3)(b) the latter not!

The Effect of TUPE

41. For the purposes of this seminar the important aspect of TUPE is regulation 4. So far as is relevant this states:

> **4 Effect of relevant transfer on contracts of employment**
> (2) …on the completion of a relevant transfer –
> (a) all the transferor's rights, duties, and liabilities *under* or *in connection with* any such contract shall be transferred by virtue of this regulation to the transferee; and
> (b) any *act or omission* before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that

> organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
>
> My emphasis

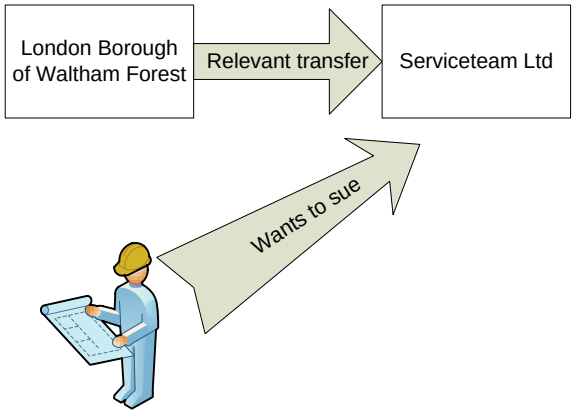
Tortious and other civil liabilities

42. Thus the transferee inherits liability in respect of the tortious acts of the transferor in so far as such acts are committed against a person employed in the undertaking transferred. This liability is acquired not just under the 'acts and omissions' provision of Reg 4(2)(b) but also under the basic provision transferring all the transferor's rights, powers, duties and liabilities under or in connection with the employee's contract of employment in Reg 4(2)(a).

Transfer of liability for an injury

43. The liability can pass to the transferor as a breach of the implied term in the employment contract itself regarding employee safety: Wilson v West Cumbrian Health Care National Health Service Trust [1995] PIQR P 38.

44. Taylor v Serviceteam Ltd and London Borough of Waltham Forest [1998] PIQR 201. T alleged that his employer was negligent and had breached the Manual Handling Operations Regulations 1992 when he injured his wrist whilst at work as a refuse collector. Months after the injury occurred, the Borough's refuse collector service was contracted out to S Ltd. T sought to recover compensation for his injury from S Ltd.



45. The Court considered that:

a. liability for negligence or for breach of statutory duty was not a liability "*under*" an employment contract within the meaning of Reg 4(2)(a), although it could amount to an act "*done…in respect"* of an employee within the meaning of what is now regulation 4(2)(b) (N.B. the new r4(2)(b) does not include the words "done…in respect");
b. an employer's duty to operate a safe system of work arose by virtue of the existence of a contract of employment. Accordingly, liability for failure to operate a safe system of work and for breach of an employer's statutory duty was a liability arising "*in connection with"* an employment contract under Reg 4(2)(a).).

46. This point is put beyond doubt in (1) Martin v Lancashire County Council (2) Bernadone v Pall Mall Services Group Ltd and ors [2001] ICR 197. The Court of Appeal arguing that employee's rights are more likely to be safeguarded if the rights that transfer from transferor to transferee are construed in a wide sense. The Court held once a breach is found to be referable to the "employment relationship" an employee's personal injury claim was capable of transfer whether the claim was pleaded in negligence, contract or breach of statutory duty. Any other decision would be highlighted by the anomaly that if Mr. Martin had sued in negligence his claim would not transfer yet if he sued for breach of the implied duty his claim would have transferred.

Transfer of liability for a risk of an injury

47. Here the risk of injury is evident before the transfer, but the injury is not sustained until after the transfer. The result is likely to depend upon the extent to which the employer should have been aware of the risk to the employee: if the transferor was or should have been aware of the risk, but did nothing about it, this omission will be imputed to the transferee under Reg 4(2)(b), so that when and if the injury is sustained the transferee will not be able to hide behind the transfer to avoid liability.

Transfer of transferor's personal injury insurance cover.

48. S.1(1) of the Employers' Liability (Compulsory Insurance) Act 1969 obliges all employers who are not exempted to insure against liability in respect of personal injuries sustained by employees arising out of and in the course of their employment.

49. Before the Court of Appeal's decision in Martin where an employee was injured before the transfer, and liability for that injury passed to the transferee upon transfer, the transferee would not be able to take advantage of the transferor's insurance under the Employers' Liability (Compulsory Insurance) Act 1969 ("EL(CI)A"). This was because the transferor's insurer would only incur liability where the transferor was liable.

50. Further, the transferee could not claim under its own compulsory liability insurance policy as this would be very unlikely to cover injuries to an employee that occurred before the employee entered the transferee's employment. This clearly left the employee disadvantaged.

51. The question of whether a transferor's right to an indemnity under an employer's liability insurance policy is a transferable right within the meaning of Reg 4(2)(a) came before the Court of Appeal in Martin. Having found that tortious liabilities were

capable of transfer under Reg 4(2), the Court went on to consider whether a transferor's right to be indemnified in respect of tortious liabilities under his employer's liability insurance passes to the transferee under Reg 4(2). Given the Court's decision that the transferor's liability to an employee in tort was a liability 'in connection with' the contract of employment within the meaning of Reg 4(2)(a), the transferor's vested or contingent right to recover from its insurers in respect of the tortious liability therefore also amounted to a vested or contingent right in respect of a liability 'in connection with' the contract. Although the right to recover an indemnity was a right under the contract of insurance - and not 'under' the contract of employment within the wording of Reg 4(2)(a) - that right was nonetheless 'in connection with' and 'arising from' the contract of employment because the liability being insured was a liability for bodily injury or disease sustained by the employees arising in the course of their employment. Accordingly, the Court concluded that Reg 4(2)(a) was not limited to the transfer of rights and liabilities only as between the employee and the transferor. Why should the insurers who took a premium in respect of the risk of liability that transferred the Court saw no reason why the Regulations should be construed in such a way as to enable them to keep the premium but not the liability!

Limits on this Protection

52. It should be carefully noted that neither transferees nor transferred employees are entirely protected. Where, for example, the transferor has failed in some respect to comply with the insurance policy - perhaps by not notifying the insurer of relevant information - the insurer may refuse to pay out, or the transferee may find that there is an excess to pay. The lesson to be drawn from this is that warranties and indemnities between the transferor and transferee can never be dispensed with.

53. Further, not every employer is obliged to take out insurance covering possible personal injury claims by their employees. S.3(1)(a)—(c) EL(CI)A provides that the following authorities and bodies are not required to effect insurance under the Act:

    a. health service bodies; National Health Service Trusts; NHS Foundation Trusts; Primary Care Trusts

b. the Common Council of the City of London; London Borough Councils councils of a county or county borough in Wales; councils constitute(under S.2 of the Local Government etc (Scotland) Act 1994 in England an(Wales or joint committees in Scotland which are so constituted as to include among their members representatives of any such council; joint authorities established by Part IV of the Local Government Act 1985
c. the Broads Authority; the Strathclyde Passenger Transport Authority
d. police authorities; the London Fire and Emergency Planning Authority •
e. the Commission for Equality and Human Rights
f. employers that are exempted by regulations (as listed in Schedule 2 to the Employers' Liability (Compulsory Insurance) Regulations 1998 SI 1998/2573).

54. So a transferee acquiring a business from an NHS Trust, for example, could inherit an uninsured claim that it might be unable to meet.

In s3 EL(CI)A cases is there a Continuing liability of the transferor?

55. Generally, once r4(2) of the 2006 Regulations has operated to transfer rights and duties to a transferee, it is not possible for a transferring employee to bring a claim against the transferor in respect of them, so the NHS trust in the example above could not normally face a claim by its transferred employee. Equally, however, a transferor will no longer be able to assert any right transferred to the transferee against the transferred employees.

Joint and Several Liability

56. In Stirling District Council v Allan and ors [1995] IRLR 301, Ct Sess (Inner House), the Court of Session noted that Article 3.1 of the Directive contains an option for Member States to provide for joint and several liability of transferor and transferee after the transfer, in respect of obligations which otherwise would fall exclusively on the transferee. The United Kingdom has opted to impose joint and several liability under TUPE in the following two areas only:

a. liability to pay compensation for the transferor's failures to comply with its information and consultation requirements and the obligations to pay compensation for such breaches; and
b. liability for personal injury claims (so far as this relates to the employee's period of employment with the transferor) in situations where the transferor is not required to take out personal injury insurance under S.3(1)(a)—(c) of the Employers' Liability (Compulsory Insurance) Act 1969 - Reg 17(2).

57. So a transferee acquiring a business from an NHS Trust, for example, could inherit an uninsured claim that it might be unable to meet. It was to address this loophole that the TUPE introduced r17(2) where the transferor and transferee are joint and several liability in respect of claims for personal injury arising out of an employee's employment with a potentially uninsured transferor.

58. The effect of joint and several liability is that an employee may sue either the transferor or the transferee or both for compensation. In that case, as the DTI Guide points out (in relation to cases under Reg 15(9)), 'where either the transferor or the new employer is the sole defendant, he may seek to join the other employer to the case' - or, where judgment is given against a sole defendant, he may be able to recover a contribution from the other potential defendant by suing him under S.1(1) of the Civil Liability (Contribution) Act 1978. Note that where a transfer occurs in a context in which the transferor is insolvent, the transferee may in effect end up bearing full liability itself, despite the provisions for joint and several liability in r17(2).

59. This, however, has served to give rise to a disparity between cases in which a transferor is from the private sector and those in which the transferor falls within the list of exempted bodies above. If the former; following the Martin decision, the transferee will inherit full liability for personal injury claims; in the latter, the transferee is jointly and several liable with the transferor.

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STRESS IN THE WORKPLACE

Introduction

60. With media headlines dominated by stories of recession, global economic meltdown and general doom and gloom, it is perhaps no surprise that there is a perception or expectation that claims of stress in the workplace have increased. This talk aims to deal with workplace harassment and stress claims from an employment and personal injury perspective.

61. There are 4 main potential claims that can arise from a complaint by an employee that they are being bullied/harassed by another colleague or line manager or stressed from too much work: (1) under the Protection from Harassment Act 1997; (2) Common law personal injury claims in negligence;(3) Claims arising out of dismissal and (4) Discrimination because of the protected characteristic of disability under the Equality Act 2010.

How Common is it

62. The Health and Safety Executive define work related stress as "a harmful reaction people have to undue pressures and demands place on them at work."

63. Their statistics for 2010/2011 released in October 2011 show that:

- The total number of cases of stress in 2010/11 was 400 000 out of a total of 1 152 000 for all work-related illnesses. This is significantly lower than the number in 2001/02.
- The number of new cases of work-related stress has reduced to 211 000 from 233 000 in 2009/10 (change not statistically significant).
- The industries that reported the highest rates of work-related stress in the last three years were health, social work, education and public administration.
- The occupations that reported the highest rates of work-related stress in the last three years were health and social service managers, teachers and social welfare associate professionals.

64. It is estimated that self-reported work related stress, depression or anxiety accounted for an estimated 10.8 million lost working days in Britain in 2010/2011

(going down from 11.4 in 2008/2009).

I - PROTECTION FROM HARASSMENT ACT 1997

65. The Protection from Harassment Act 1997 was a piece of legislation designed to deal with the problem of stalking, not work-related stress. This is perhaps obvious from the pre-amble to the Act which simply states: *"An Act to make provision for protecting persons from harassment and similar conduct."*

66. Although there is no express reference to stalking, that was perhaps deliberate, as the 1997 Act was designed to deal with behaviour which did not fall within a specified criminal offence. It provided civil remedies to the victim in section 3 by way of an injunction to prevent the ongoing harassment and damages. The civil burden of proof applied. Further, harassment was a criminal offence under section 2 of the 1997 Act.

67. It is a relatively simple piece of legislation:

Section 1

- This is the section, as far as England and Wales is concerned, that is the effective clause in the Act. It provides that ***a person must not pursue a course of conduct which amounts to harassment and which he knows or ought to know amounts to harassment of the other person*.**

- The important features are that it must be a course of conduct; a single incident is not sufficient. Also:

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.

- Section 1(3) provides the opportunity of a defence if the conduct was justified because it was for the purpose of detecting crime, it was pursued under some enactment for the purpose of ensuring compliance with some condition

imposed on the victim, or that in the circumstances it was reasonable.

Section 2

- Section 2 provides that a person who pursues a course of conduct in breach of section 1 is guilty of a criminal offence.

Section 3

- This section provides that an actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim.

- Section 3(2) provides that damages may be awarded for anxiety caused by the harassment and any financial loss resulting from it. Therefore, it is possible to obtain damages for something less than a recognised psychiatric disorder, which is the usual test for an actionable mental injury, in the absence of any physical injury.

Limitation

- Section 6 of the Act specifically provides that the time limit for the commencement of an action in section 11 of the Limitation Act 1980 does not apply to claims under this Act. The time limit for commencing an action is therefore six years.

Interpretation

- Section 7 provides assistance in interpreting the previous sections. It provides that references to harassing include causing alarm or distress. It also specifically provides that a course of conduct must involve conduct on at least two occasions, with conduct being defined to include speech.

9. In summary therefore:

    - 2 or more incidents required
    - No statutory definition of harassment
    - No need for forseeability or 'because of'
    - Employer vicariously liable for acts of employee
    - Six year limitation (compared with 3 months under the discrimination provisions in the Equality Act 2010)
    - Can be brought in High Court or County Court but not Employment Tribunal
    - Part 8 procedure.

10. So the 1997 Act was happily pottering along until the case of ***Majrowski v Guys' and St Thomas's NHS Trust [2007] 1 AC 224.*** In that case, the House of Lords held that an employer could be held liable under the principle of vicarious liability for a course of conduct by one of its employees that amounted to harassment under section 1 of the 1997 Act. M argued that his line manager had harassed, bullied and intimidated him during the course of his employment. The Trust's argument that the 1997 Act was not aimed at the workplace, but at stalking, was rejected.

11. Lord Nicholls of Birkenhead stated in relation to the argument that employers could be pursued long after the employee in question had left their employment:

> *"30 This is a real and understandable concern. But these difficulties, and the prospect of abuse, are not sufficient reasons for excluding vicarious liability. To exclude liability on these grounds would be, to use the hackneyed phrase, to throw the baby out with the bathwater. It would mean that where serious harassment by an employee in the course of his employment has occurred, the victim-who may not be a fellow employee-would not have the right normally provided by the law to persons who suffer a wrong in that circumstance, namely, the right to have recourse to the wrongdoer's employer. The possibility of abuse is not a good reason for denying that right. Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the "close connection" test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 ."*

12. "Harassment" was further defined by Baroness Hale of Richmond as [paragraph 66]:

> *"If this was the aim, it is easy to see why the definition of harassment was left deliberately wide and open-ended. It does require a course of conduct, but this can be shown by conduct on at least two occasions (or since 2005 by conduct on one occasion to each of two or more people): section 7(3) . All sorts of conduct may amount to harassment. It includes alarming a person or*

causing her distress: section 7(2) . But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."

13. In the past six years since Majrowski was decided, the following cases have developed the use of the 1997 Act:

- ***Allen v LB of Southwark [2008] EWCA Civ 1478*** - Court of Appeal held that the first instance judge had been wrong to strike out proceedings in the county court which alleged that 5 unsuccessful possession proceedings for rent arrears brought by Southwark could constitute harassment.
- ***Ferguson v British Gas Trading Ltd [2009] EWCA Civ 46*** – Court of Appeal held that threatening letters from British Gas to a consumer could amount to harassment within the 1997 Act. Jacob LJ said as follows at paragraph 17:

  "I accept that a course of conduct must be grave before the offence or tort of harassment is proved. And that, as Mr Porter accepted after some discussion, the only real difference between the crime of section 2 and the tort of section 3 is standard of proof. To prove the civil wrong of harassment it is necessary to prove the case on a balance of probabilities, to prove the crime, the standard is the usual criminal one of beyond a reasonable doubt.
  18 In so accepting I would just add this word of caution: the fact of parallel criminal and civil liability is not generally, outside the particular context of harassment, of significance in considering civil liability. There are a number of other civil wrongs which are also crimes. Perhaps most common would be breaches of the Trade Descriptions Act 1968 , as amended. In the field of intellectual property both trade mark and copyright infringement, and the common law tort of passing off (which generally involves deception), may all amount to crimes. It has never been suggested generally that the scope of a civil wrong is restricted because it is also a crime. What makes the wrong of harassment different and special is because, as Lord Nicholls and Lady Hale recognised, in life one has to put up with a certain amount of annoyance: things have got to be fairly severe before the law, civil or criminal, will intervene."

- ***Conn v Sunderland City Council [2008] IRLR 324*** the Court of Appeal held that on the facts the acts did not amount to harassment. C was a paviour who alleged that his foreman, F, had harassed him. The judge found that on two occasions F had lost his temper, acted in an aggressive manner and threatened violence. On

the first occasion F had demanded to know who had left work early and when C refused to tell him he shouted and threatened to smash a window. On the second occasion he had approached C to ask why he was not talking to him and had then threatened to hit him. The judge held there had been a course of conduct that F knew, or ought to have known, amounted to harassment. The local authority argued that neither of the two incidents was of sufficient gravity to constitute harassment.

The appeal was allowed. The basis for deciding whether the conduct complained of fell within s.1 and s.3 was whether it was of such gravity as to justify the sanctions of the criminal law. In the instant case the judge had been wrong to hold that the two incidents amounted to a course of conduct. Although the second incident crossed the line into oppressive and unacceptable conduct, the first did not: it was not conduct that was unlawful; there was no physical threat, merely a threat to property. While the incident was unpleasant it fell below the line of conduct that justified a criminal sanction and could not amount to harassment.

- ***Veakins v Kier Islington Limited*** **[2010] IRLR 132**. The Claimant alleged that she was harassed at work by her supervisor, which resulted in her suffering from depression and going on long term sickness. On one occasion, V had been told to 'fuck off'. The Claimant's evidence was largely unchallenged. The claim failed at first instance. The Court of Appeal held that In deciding whether there was harassment the primary focus was on whether the conduct complained of was oppressive and unacceptable, albeit the court had to keep in mind that the conduct was of an order that would sustain criminal liability. On the facts of the case, LJ Maurice Kay held that:

  "It seems to me that the Recorder undervalued the evidence. The account of victimisation, demoralisation and the reduction of a substantially reasonable and usually robust woman to a state of clinical depression is not simply an account of "unattractive" and "unreasonable" conduct (in Lord Nicholl's

words) or "the ordinary banter and badinage of life" (in Baroness Hale's words). It self-evidently crosses the line into conduct which is "oppressive and unreasonable". It may be that, if asked, a prosecutor would be reluctant to prosecute but that is not the consideration, which is whether the conduct is "of an order which would sustain criminal liability". I consider that, in the event of a prosecution, the proven conduct would be sufficient to establish criminal liability. I do not accept that, in a criminal court, the proceedings would properly be stayed as an abuse of process."

- **Hayes v Willoughby [2011] EWCA Civ 1541.** W held a genuine belief that H had been guilty of fraud, false accounting or tax evasion. He made some numerous allegations offraud embezzlement to the Inland Revenue, Customs and Excise, the Police and the Official Receiver. The Official Receiver alone received some 400 communications. The trial judge held that W's conduct exceeded 'even the widest limits of reasonableness and became unreasonable and excessive" but found that W had established the statutory defence in section 1(3)(a) namely that the purpose of his conduct was prevention or detection of crime. The Court of Appeal held that to the extent that the course of conduct is adjudged irrational or lacking in any reasonable connection to the avowed purpose of preventing or detecting crime, the likely conclusion will be that the purpose of the conduct was not for the prevention or detection of crime.

II – COMMON LAW CLAIMS

9. Following the decision on vicarious liability of ***Majrowski*** employers are now more suspectible to claims made against them in the civil courts in negligence resulting from the behaviour of their employees causing work related stress or psychiatric injury. As stated by Scott Baker LJ in the case of ***Hartman v South Essex Mental Health & Community Care NHS Trust [2005] ICR 782*** [a case where stress was caused by excessive workload]*:*

"Liability for psychiatric injury caused by stress at work is in general no different in principle from liability for physical injury"

10. Employees must however establish that the injury was reasonably foreseeable and flows from the employer's breach of duty.

11. In the case of 4 conjoined appeals by employees against their employees for psychiatric injury caused by stress, ***Barber v Somerset County Council [2002] EWCA Civ 76*** **-** **[**House of Lords [2004] UKHL 13 but not overturning the Court of Appeal guidance] – the Court of Appeal provided the following general guidance at paragraph 43:

> *" (1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20).*
>
> *(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).*
>
> *(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29).*
>
> *(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para 24).*
>
> *(5) Factors likely to be relevant in answering the threshold question include: (a) the nature and extent of the work done by the employee (para 26). Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness*

or absenteeism in the same job or the same department? (b) Signs from the employee of impending harm to health (paras 27 and 28). Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers (para 29). ****632***

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (para 31).

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk (para 32).

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para 33).

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this (para 34).

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job (para 34).

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (para 33)".

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35).

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42)."

13. The case of ***Hartman v South Essex Mental Health & Community Care NHS Trust*** concerned 6 conjoined appeals. (1) The employment of the respondent (H) as a nursing auxiliary in a centre for children with learning difficulties had been terminated as a result of her ill health from depression and anxiety. The judge accepted evidence that, but for pressures at work, her condition would not have become chronic or lasted so long. He found that H was in a high risk occupation that imposed on employers a higher than normal standard of alertness in respect of the risk of psychiatric injury and that the employer had failed to protect her from foreseeable harm as it was aware of her pre existing vulnerability and there had been complaints about staff shortages. (2) The respondent (B) had retired through ill health from his job as a senior lecturer following a breakdown. The judge concluded that the university knew of the excessive work burden on B and had enough information to realise that he was at a real and immediate risk of a breakdown. (3) The respondent (W) had given up her job as a customer services representative for a bank as a result, so the judge found, of a moderate depressive episode with panic attacks. The judge found that the bank had been aware through their occupational health department of impending harm to W but had failed to discuss it with her. (4) The respondent (G) had retired through ill health from his job as chief sub editor following a breakdown. He had written a memorandum complaining about his workload but the judge found that his employer could not have foreseen that his inability to cope was more than occupational stress. (5) The respondent (M) had retired through ill health caused by a colleague's sustained bullying for which his employer was held liable. (6) The

respondent (X), a prison health care officer, retired with a stress related illness after dealing with an inmate's suicide.

14. The Court of Appeal approved the guidance in ***Barber*** and that it was foreseeable injury flowing from the employer's breach of duty that gave rise to liability for injury caused by stress at work. On the facts (1) There was no basis for concluding that caring for children with learning difficulties imposed on H's employer a higher standard of alertness to the risk that its employees would sustain psychiatric injury. The fact that H might be vulnerable had been confidential information and her employer could not be fixed with knowledge of it. Despite general complaints of staff shortages, in the absence of signs that she was particularly vulnerable there had been nothing to indicate that H could not cope with her work. It was not reasonably foreseeable to her employer that H would suffer psychiatric injury, so it was not in breach of duty to her. (2) The finding that B's breakdown was reasonably foreseeable was vitiated by errors of fact by the judge and was contrary to the weight of the evidence. There were no sufficient indications of harm to B's health arising from stress at work. The outcome of B's claim did not depend on his failure to use the university's counselling service but it was a factor that the judge should have given credit for when considering whether the university was in breach if its duty of care. (3) It would only be in exceptional circumstances that a person working part time would be able to succeed in a claim for injury caused by stress at work. The bank had breached its duty to W by failing to act on its own advice and to take steps to reduce the stress on her and the judge had been entitled to find on the medical evidence that this breach of duty had caused her to suffer an identifiable psychiatric injury. (4) The judge had been justified in concluding that the employer's response to G's memo had been reasonable. (5) Once the work related stress had been shown to be the cause of M's loss of earnings it was for his employer to show that there were other potential causes as well in order for damages to be apportioned. It had failed to do this, and the only non negligent stressors identified related to M's work. (6) X's employer had foreseen the risk of injury for the type of work but in X's case it had failed to

implement a system that it had designed to deal with that risk. The mere fact that an employer offered an occupational health service should not lead to the conclusion that the employer had foreseen risk of psychiatric injury to any individual or class of employee due to stress at work.

15. **Other Cases.** Other cases where the test of reasonable foreseeability applied.

- **Sayers v Cambridgeshire CC [2007] IRLR 29, QBD**

It was not reasonably foreseeable that the claimant would suffer psychiatric injury if nothing was done to alleviate the workplace stress that contributed to her depressive episode. Although the employers should have been aware that the claimant was overworked, in the sense that she could not complete her workload in the 37 core hours that applied to her post, and generally worked between 2 and 12 hours a week more than the 48-hour limit imposed under the Working Time Regulations, that knowledge did not make the claimant's illness reasonably foreseeable. Different people have different capacities for the amount of work they take on and the number of hours they work. The claimant was a successful operations manager and although she constantly complained about her very heavy workload, she had been promoted to a demanding and difficult post. There were no signs to indicate a vulnerability to psychiatric illness caused by that workload.

- **Green-v-DB Group Services (UK) Limited,** [2006] IRLR 764

Ms Green relied upon three causes of action, negligence, breach of contract and breach of statutory duty (the Protection from Harassment Act). The judge, Owen J, decided, as appears to have been acknowledged by all parties, that the breach of contract claim would succeed or fail with the negligence claim (para 2). Owen J reminded himself of the threshold test of foreseeability as laid down in *Hatton-v-Sutherland* (para 5) on the issue of negligence.

- He also stated that:

> *"… the questions to be determined when considering whether alleged bullying and harassment give rise to a potential liability in negligence were addressed by Gray J in Barlow v Borough of Broxbourne Barlow v Borough of Broxbourne [2003] All ER (D) 208 (Jan). His analysis, with which I respectfully agree, and which is directly applicable to this case, is to be found in paragraph 16 of his judgment:*
>
> *'(i) whether the claimant has established that the conduct complained of in the particulars of claim took place and, if so, whether it amounted to bullying or harassment in the ordinary connotation of those terms. In addressing this question it is the cumulative effect of the conduct which has to be considered rather than the individual incidents relied on;*
>
> *(ii) did the person or persons involved in the victimisation or bullying know, or ought they reasonably to have known, that their conduct might cause the claimant harm;*
>
> *(iii) could they, by the exercise of reasonable care, have taken steps which would have avoided that harm and*
>
> *(iv) were their actions so connected with their employment as to render the defendant vicariously responsible for them.'*

The facts are as follows:

- Ms Green's case was based on three separate periods of different behaviour. From October 1997 to mid 1998 she complained of the actions of four women working in the same areas as her, from mid 1998 to November 2000, when she suffered a breakdown, and then from March 2001 to October 2001, when she suffered a further breakdown. Ms Green relied on the cumulative effect of all of the behaviour.

- In relation to the first period the sort of behaviour that Ms Green complained of was: ignoring her, staring at her, ostentatiously greeting others while not greeting her, excluding her from conversations and group activities, bursting out laughing when she walked past their desks, making lewd comments and removing her name from circulation lists are some of the things about which she

complained.

- Owen J had no difficulty finding that these events occurred as described by Ms Green and that they amounted to harassment. He also concluded that the defendant was vicariously liable (para 101) and that the behaviour was such that there was foreseeable risk of psychiatric injury from the behaviour.

- The second period largely involved allegations against a single colleague, who was said to have engaged in a campaign to undermine and humiliate her so that he raised his own profile at her expense. Concerns about the atmosphere in Ms Green's department as a result led the defendant to organise harassment training. Owen J concluded that the behaviour, taken as a whole, amounted to bullying and harassment and also that the person concerned did or should have realised that it might cause psychiatric harm (paras 151 to 153).

- For the third period, which was after Ms Green had been off work and up to her second breakdown, the allegations were largely that the defendant did not manage the return to work properly. Owen J did not agree with this claim. He found that the defendant had done all that could be reasonably expected but that events that did not involve a further breach of duty precipitated the second breakdown (paras 168 & 168). That did not however defeat the claim for the second breakdown because on causation Owen J found that the breaches of duty involved in the first and second period had caused Ms Green to become so vulnerable that it was a material cause of the second breakdown.

- Ms Green therefore succeeded not only under the Act but in common law. The behaviour of which she complained was such that it was foreseeable that she might suffer psychiatric harm. It was clearly of assistance to her case that she could rely upon the Act but in the event it was not necessary for her success. General damages: £35,000; total award £852,000.

- **Clark-v-The Chief Constable of Essex Police, [2006] EWHC 2290 (QB**)

- Mr Clark was a police officer and involved in a large enquiry relating to theft and handling stolen goods. He was employed by the defendant from 1976 until 27 January 2002. He stopped work on 13 October 1999. Proceedings were issued on 11 October 2002. The complaint by Mr Clark was one of bullying and some of the events could have been the subject of a claim under the Act. In the event however, Mr Clark relied upon negligence as his cause of action, although he did include an allegation of breach of the implied term of the employment contract not to do anything which might destroy or seriously damage the relationship of trust between employer and employee.

The facts are:

- The substance of the complaint by Mr Clark was that in performing his role in the major enquiry he had upset three senior officers, a Detective Sergeant, a Chief Inspector and a Detective Chief Inspector. Those three officers then deliberately acted for revenge to punish him. The bullying allegations include shouting at him, demanding unnecessary reports, refusing bona fide expense claims, transfer to another job in circumstances where he was made to understand it was punishment and being dismissed as officer in charge of the case at the start of the trial and threatened with defamation proceedings by one of the other officers. These incidents occurred in 1999 up to October, which is when he became ill and stopped work.

- General damages: £18,000.

16. **Bang up to date cases.** The same principles continue to be applies, more often than not against the employer:

- ***Mullen v Accenture Services Limited [2010] EWHC 336:*** Although an employee had suffered a psychiatric illness as a result of stress at work his employer was not liable for damages for personal injury as it could not reasonably have foreseen that as a consequence of his work he was at real risk of suffering imminent harm to his health. Breach of the Management of Health and Safety at Work

Regulations 1999 reg.3 did not give rise to an actionable claim requiring the application of a less onerous test of foreseeability and causation than the common law test; there had to be foreseeability on the part of the employer in respect of the particular illness suffered by the particular employee. On the facts it was found that although M's colleagues may have used blunt and inappropriate language, M was not at the receiving end of genuinely offensive and unacceptable behaviour.

- ***Rayment v Ministry of Defence [2010] IRLR 218***: R was employed by the MOD at the Honourable Artillery Company as a driver and brought a claim under the Protection from Harassment Act 1997 alleging that she had been subjected to persistent bullying and alleged that she had suffered psychiatric damage, namely an adjustment disorder. She had a pre-existing psychiatric history. The claimant former employee (R) sought damages for breach of the Protection from Harassment Act 1997 and/or negligence against the defendant employer (M). R had been employed by M at the Honourable Artillery Company as a driver and in the ceremonial stores department. She had a lengthy psychiatric history, but had made no disclosure in advance of her employment. R felt faint on a driving assignment, and was certified off sick for several weeks. She was not permitted to drive until further notice. Meanwhile, R's timekeeping, attendance, attitude and conduct had been of significant concern. R returned to work and at a meeting she was told by the primary staff officer that as she could no longer drive she would be unable to work as a driver. She was also told that it transpired that she no longer had a job at all and that she was required to repay one month's salary. R was reinstated following intervention by the army welfare service. R made a redress of complaint against her superiors for discrimination and harassment, and was signed off sick. She received a formal written warning. After the expiry of the warning, but whilst R was still on sick leave, she was discharged from her duties on the grounds that she had not returned to work and had served another redress of complaint. Further incidents included the return of photographs of sexually explicit women that R had removed from a

restroom.

There had been a breach of the 1997 Act. The meeting which left R without a job and informed her to repay a month's salary, the written warning, the discharge and the failure to remove the photographs were oppressive, unacceptable and amounted to harassment. The negligence claim failed. The meeting, the written warning and the discharge were all deliberate acts designed to end R's employment as a driver, and did not fit easily with the concept of negligence given that each act was premeditated with a specific aim. In addition, M had taken steps to ensure that R's condition did not deteriorate following the first time she felt ill, and it could not be said that there was a forseeable risk of injury. Damages £5,500.

- ***Dowson v Chief Constable of Northumbria Police [2010] EWHC 2612 (QB)*** 6 police officers's claims for damages under the 1997 Act were dismissed. Each allegation of harassment would be dismissed. The evidence revealed a stressful working environment and a dysfunctional group of police officers racked with division and backbiting. Although there were occasions when P was insensitive, belittling and overbearing, his conduct did not amount to harassment. Although unacceptable, it was not conduct calculated to cause distress, and it was neither oppressive nor a tormenting by constant interference or intimidation

- ***Whiteside v Croydon LBC [***2010] EWHC 329 (QB) . W former planning officer was A former employee, who suffered psychiatric injury due to work-related stress, and was entitled to damages from his former employer. The employer's failure to undertake risk assessments of the employee's susceptibility to work-related stress or to manage his workload appropriately amounted to clear breaches of its contractual duty to protect his health and safety.Damages to be assessed.

- ***Maclennan v Hartford Europe Ltd [2012] EWHC 346 (QB)*** The court rejected a claim for damages by an employee who alleged that she had sustained chronic fatigue syndrome as a result of workplace stress. There was no proven causal link between stress and chronic fatigue syndrome, and the employee had

established no evidential basis for either causation or foreseeability.

14. **Damages.** Damages for claims under the 1997 Act are awarded in accordance with the guidance given in Vento v Chief Constable of Yorkshire [2003] ICR 318 as updated [lower band £500 to £6000, Middle band £6,000 to £18,000; upper band £18,000 to £30,000].

15. Damages in civil claims are awarded in accordance with the Judicial Studies Board guidelines for psychiatric injuries supported by expert medical evidence.

III – Dismissal

16. A failure by the employer to tackle the cause of bullying or harassment (for example) may amount to a breach of the implied term of trust and confidence and lead to unfair constructive dismissal.

17. What about the employee whose stress is caused by the employer, but as a result becomes incapable of working, does the employee have a claim for unfair dismissal?

- **Royal Bank of Scotland v McArdie (EAT/0268/06)**
- The employee developed a stress-related illness which the Tribunal held was attributable to the conduct of one of her managers and which was then exacerbated by the mis-handling of the employer's Grievance Procedure. After a year she was dismissed for incapacity, in circumstances where both her position and the medical evidence was unequivocal that there was no prospect of her ever returning to work. The Tribunal held that the dismissal was unfair because the illness had been caused by the employers' unreasonable behaviour. Held: that that was a misdirection and in the circumstances the dismissal could not have been held to be unfair.

- *"The situation where an employer has dismissed an employee on account of ill-health or incapacity for which he is in whole or in part responsible has been considered in three decisions of this Tribunal –* ***London Fire and Civil***

Defence Authority v Betty *[1994] IRLR 384;* ***Edwards v Governors of Hanson School*** *[2001] IRLR 132; and* ***Frewin v Consignia Ltd*** *(unreported EAT/0981/02). In* ***Betty*** *Morison P appeared to say that the fact that the employer had been responsible for the incapacity which was the reason for a dismissal should as a matter of principle be ignored in deciding whether it was reasonable to dismiss for that reason.*

- *But Bell J in* ***Edwards*** *and Judge Reid QC in* ***Frewin*** *expressed the view that, if that was what Morison P meant, it overstated the position. We agree. It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable… However, we accept, as did Bell J and Judge Reid, that much of what Morison P said in* ***Betty*** *was important and plainly correct. Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work."*

18. A Claimant could also claim that they were constructively [unfairly] dismissed contrary to section 95(1)(C) of the ERA 1996. Most constructive dismissal claims fail because the Claimant has to establish:

    - That the employee committed a repudiatory breach of contract
    - That they resigned in response to the breach of contract
    - That the employee did not waive the breach of contract [Western Excavating Ltd v Sharp [1978] ICR 221].

19. There are, however, examples where such claims have been successful. In the case of ***Abbey National v Robinson [2001] Emp LR 1***, Abbey National were unsuccessful in overturning a finding by the Employment Tribunal that it had unfairly constructively dismissed R.

20. The facts were R had been subjected to harassment and bullying from her line

manager, M, causing R to invoke the company's grievance procedure. This resulted in disciplinary action being taken against M but not his removal from the department in which R worked. It was submitted that the notification to R in 1997 that M was not going to be removed from the department, constituted the repudiatory incident giving rise to R's right to resign and her subsequent resignation a year later was too late to be considered timeous, since her decision to continue working constituted an affirmation of the contract. R had gone off sick with a stress-related illness.

21. The EAT held that R's resignation was a result of the cumulative effect of her treatment and a gradual breakdown in trust and confidence evidenced by the overall conduct and attitude of A, and that her right to resign did not stem from one particular point in time, Western Excavations (ECC) Ltd v Sharp [1978] Q.B. 761 considered. The eventual breakdown in trust and confidence originated with the incident in 1997, but it was A's continued failure to deal with R satisfactorily as an employee which finally eroded the relationship between R and A. The tribunal had therefore been correct to refer to a course of conduct over a period of time when determining R's right to repudiation, Lewis v Motorworld Garages Ltd [1986] I.C.R. 157 applied. Where a course of conduct had been established and an employee had resigned owing to a "last straw" incident the tribunal must look to the end rather than the beginning of that series of events.

IV Discrimination

22. Work-related stress could fall within the anti-discrimination provision of the Equality Act 2010 if the resultant illness satisfies the definition of section 6 and Schedule 1 of the 2010 Act.

23. The definition is similar to the definition under the Disability Discrimination Act 1995, save that the reference to the 8 ‘capacities’ [mobility, manual dexterity, physical coordination etc] has been removed:

Section 6:

> *" (1) A person (P) has a disability if—*
> *(a) P has a physical or mental impairment, and*
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

24. An impairment has long term effects if:

> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*

25. A substantial effect is one that is more than merely trivial. As mentioned above, 'normal day to day activities' are no longer assessed as previously by reference to 'capacities." Reference is now made to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" and consider factors which are in practice quite similar to the previous capacities, including communication, physical coordination and concentration.

26. Panic attacks and depression have satisfied the above tests and have fallen within the meaning of disability.

27. Once the definition of disability hurdle has been overcome, a claimant can turn their mind to whether the claim is one of direct discrimination contrary to section 13 of the Equality Act 2006, harassment contrary to section 26 or perhaps a claim for failure to make reasonable adjustments contrary section 20 and 21 of the 2010 Act.

28. If successful, all attract awards for injury to feelings in line with the Vento guidance.

Conclusion

29. The perception is that claims for stress in the workplace claims are increasingly common. It would appear that the Courts are increasing the scope of such claims. However, the good news is that when the statistics are examined such claims are

actually decreasing in number and the Courts are simply applying old and well tested principles to the modern workplace.

GILLIAN CREW

Ely Place Chambers

12th March 2012

CAN THE SINS OF THE SON BE VISITED UPON THE FATHER?

Iain Daniels

Ely Place Chambers

Introduction and Summary

60. As corporate structures become more complex and groups of companies more centralised and integrated claimants, particularly those seeking to pursue industrial disease and deafness cases where the exposure was some years ago, may find it increasingly challenging to identify the right defendant and if they do identifying the relevant insurer. Companies may merge, go out of business or simply become names at Companies House. Claimants may be unsure who their employer actually was particularly if they are seconded or transferred through the corporate structure. In such circumstances is it not simply easier to look up the corporate chain and identify the legal entity in charge? Sue the parent for the wrongdoing of its offspring?

61. In many such actions this will not cause difficulties, where insurers are the same the title on the pleadings may not trouble anyone too much and the case will progress as normal. But what of the circumstances where the defendant does care, what if there is no identifiable insurer or the subsidiary is in another jurisdiction?

62. The position is not as simply as it might be, as ever it is all about fact and degree with the law in the process of changing.

The Status of Limited Liability Companies

63. It is long established law that a company limited by shares has a separate and distinct legal identity from its owners: Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22. This is most recently enshrined in section 16(2) and (3) of the Companies Act 2006. The very point of limited liability is that the shareholders and directors cannot, save in the most

circumscribed circumstances be liable for the actions of the company. The position is the same whoever or whatever holds the shares and therefore is no different where the company's shares are owned by another company as opposed to one or more individuals.

64. Corporate share ownership by way of a holding company or otherwise is commonplace and group structures have a variety of advantages including economies of scale by way of shared services, mutual financial support and parallel and complimentary goals. Companies will share wage and accounting services, pensions and bargain with suppliers from a position of collective strength. More pertinently groups of companies may share more specialist services such as the provision of health and safety advice and assistance and the joint development of protocols, practices and procedures to secure the health, safety and welfare of their collective employees. That said a subsidiary remains a distinct and separate legal entity and those operating that particularly company have the same non-delegable responsibilities to promote its welfare as with any other limited company. By the same measure those responsibilities cannot on their face be upwardly delegated, the individual company, through its directors, managers and employees retain the legal obligations under statute and common law to look after the safety of employees.

Piercing the Corporate Veil

65. There are limited circumstances in which the shareholders and in some cases the directors can be held personally liable for the default of the company, these are represented by the principle of *piercing the corporate veil.*

66. These exceptional circumstances include:

    a. Fraud where the company is set up or run for fraudulent purposes the courts will take action to hold the fraudsters liable: Jennings v CPS [2008] 4 ALL ER 113(HL)

b. Single economic entity where a group of companies in effect trades as one;

c. Agency where the subsidiary is acting as agent for the parent;

d. Avoidance of a legal duty, such as fiduciary duties.

67. It follows that the law has steadfastly refused to permit the corporate veil to be pierced so as to create liability for the shareholders save in very rare and limited circumstances, even when to some the result might appear to be unfair. Indeed the 'justice' argument for piercing the corporate veil was not accepted by the Court of Appeal: Adams v Cape Industries Plc [1991] 1 All E.R. 929 (see more below).

68. The principal is most clearly set out in Staughton LJ's judgment in Atlas Maritime Co SA v. Avalon Maritime Ltd, The Coral Rose [1991] 4 All E.R. 769 at 779

> "*The creation or purchase of a subsidiary company with the minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine.*"

69. A further clear statement of this principle can be found in Slade LJ judgment in Adams v Cape Industries Plc:

> "*Our Law for better or worse, recognises the creation of subsidiary companies, which, though in one sense, the creation of their parent companies, will nevertheless be treated as separate legal entities. … We do not accept as a matter of Law that the Court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group … will fall on another member of the group rather than the defendant company. Whether this is desirable or not, the right to use a corporate structure in this way is inherent in our law*."

Liability Through Agency

70. Agency too does not hold out too much hope for a claimant, with the courts seemingly limiting the potential liability to cases where the company is a mere façade, albeit legitimate one for the principal or parent. The Court of Appeal considered agency in Adams v Cape Industries Plc, Slade LJ indicated in refusing to accept the arguments in favour of agency:

> "*However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In the court below the judge, ante, p. 484B, refused an invitation to infer that there existed an agency agreement between Cape and N.A.A.C. comparable to that which had previously existed between Cape and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers it just so to do.*"

71. Adams v Cape Industries Plc is a case which involves the alleged liability of the holding company for a foreign subsidiary which exposed its employees to asbestos. It was argued in that claim, that the subsidiary was the agent of the holding company. It appears to have been conceded by the claimant that more was needed than simple overall control, if it was not the Court of Appeal certainly found as much:

> "*As to the relationship between Cape and N.A.A.C., it is of the very nature of a parent company-subsidiary relationship that the parent company is in a position, if it wishes, to exercise overall control over the general policy of the subsidiary. The plaintiffs, however, submitted that Cape's control extended to the day-to-day running of N.A.A.C.*"

72. What is needed therefore is more than the ability to command or the control by general policy and overall control. A parent is therefore unlikely to be made responsible for giving general direction, however specific requirements and day-to-day direction may be different (see below).

The Single Economic Entity

73. In Adams v Cape Industries Plc the Court Appeal also found that a consistency of economic interest was insufficient:

> "*In the light of the set up and operations of the Cape group and of the relationship between Cape/Capasco and N.A.A.C. we see the attraction of the approach adopted by Lord Denning M.R. in the D.H.N. case [1976] 1 W.L.R. 852 , 860c, which Mr Morison urged us to adopt: "This group is virtually the same as a partnership in which all the three companies are partners." In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J. that the observations of Robert Goff L.J. in Bank of Tokyo Ltd. v. Karoon (Note) [1987] A.C. 45 , 64, are apposite:*
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> > *"[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."*

74. The Court of Appeal further made it clear that the corporate veil could be lifted in only one out of three circumstances:

a. where the court is construing a statute, contract or other document;
b. when the court is satisfied that the company is a mere façade concealing the true facts;
c. when it can be established that the company is an *authorised* (emphasis added) agent of its controllers, whether human or corporate.

Fairness and Justice

75. The principles of equity and fairness, save where the corporate structure is a mere sham are not relevant matters as was confirmed by Munby J in Ben Hashem v. Al Shayif [2009] 1 FLR 115 referring in part to the judgment of the Court of Appeal in Adams:

159 In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in Salomon v A Salomon & Co Ltd [1897] AC 22 , but clear statements to this effect are to be found in Mubarak at page 682 per Bodey J and Dadourian at para [679] per Warren J. Control may be a necessary but it is not a sufficient condition (see below). As Bodey J said in Mubarak at page 682 (and, dare I say it, this reference requires emphasis, particularly, perhaps, in this Division): "it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control."

160 Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. In common with both Toulson J in Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2) [1998] 1 WLR 294 at page 305 and Sir Andrew Morritt VC in Trustor at para [21], I take the view that the dicta to that effect of Cumming-Bruce LJ in In re a Company [1985] BCLC 333 at pages 337-338, have not survived what the Court of Appeal said in Cape at page 536:

"[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v Salomon & Co Ltd [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

Proximity – A new tack

76. The courts having refused to extend the principles of piercing the corporate veil claimants were left with the limited circumstances where they can show a clear agency arrangement with day-to-day (or similar) direction given to the subsidiary by its parent. The potential way out for a claimant is by the claimant attempting to circumvent the corporate veil and demonstrate a direct duty of care between parent

and the employees of its subsidiary. This is not unlike the agency argument but gives a wider scope for argument on liability. The possibility of doing this was foreshadowed in Lubbe v Cape Plc [2000] 1 W.L.R. 1545, in the speech of Lord Bingham:

> "*The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.*"

77. The claim itself was more about forum shopping with the claimants seeking to try an action involving exposure to asbestos in South Africa in this jurisdiction. Lord Bingham does not address himself to the principles relating to piercing the corporate veil, nor does he set out his views in any further depth and the passage can be treated as *obiter:* however it raises the possibility of an argument on direct responsibility by way of establishing a duty of care.

78. This was the claimant's argument in Chandler v Cape plc [2011] EWHC 951 heard by Wyn Williams J. Chandler represented the classic case of this genre, in that Mr Chandler had been exposed to asbestos whilst working at Cape Building Products Ltd ("CBP") in Uxbridge in the late 50s and early 60s. He had developed asbestosis as a result of this exposure much later and sought damages from the defendant as his actual employer, CBP, was no longer in existence and was not insured over the relevant period. He argued that the defendant and CBP were joint tortfeasors due to CBP being a wholly owned subsidiary of the defendant from June 1956, i.e. before the period of exposure (for this argument to work the parent company must own the subsidiary at the time to become liable, something not always necessary with

breaching the corporate veil).

79. Wyn Williams J concentrated on the company documents to analyse the role taken by the defendant in the provision of health and safety (in the context of the handling of asbestos) at CBP. He found that the defendant took a decision making role in the running of CBP, there was a commonality of control, the same directors sat on the boards, the financial arrangements were centralised and decisions on the defendant and groups business were implemented by direction to CBP. Of particular import is that the defendant's medical officer, a Dr Smither was found to, "*..engage in wide-ranging discussions as to the likely harmful effects of the exposure to asbestos which obviously were of much wider purport than the particular condition prevailing at one factory*" and had specifically become involved with the investigation and consideration of an employee who had become unwell at Uxbridge with an asbestos-related condition. He also liaised with the doctor engaged at Uxbridge over health and safety matters. Additionally the defendant engaged a chemist and scientist to advise it on dust-suppression at its premises.

80. Clearly this goes beyond general advice and overarching protocols for health and safety: for example a group requirement that subsidiaries have their own policies and assessments.

81. The decision to find the defendant liable was based upon the three stage test in Caparo v Dickman [1990] UKHL 41:

    a. Foreseeability of damage.
    b. Relationship of proximity.
    c. Fair, just and reasonable.

82. There was little trouble with foreseeability as the evidence was that the defendant was aware of the harmful effects of asbestos, the state of the premises (open-sided) and the risk posed to the workforce. Indeed it conceded this part of the test.

83. The Court found that the defendant was aware of the risks, had the ability to do something about them, dictated policy in respect of health and safety to its subsidiaries including CBP but chose not to intervene. This it was found created a sufficiently proximate relationship:

> "*The Defendant employed a scientific officer and a medical officer who were responsible, between them, for health and safety issues relating to all the employees within the group of companies of which the Defendant was parent. On the basis of the evidence as a whole it was the Defendant, not the individual subsidiary companies, which dictated policy in relation to health and safety issues insofar as the Defendant's core business impacted upon health and safety. The Defendant retained responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to the risk of harm through exposure to asbestos. In reaching that conclusion I do not intend to imply that the subsidiaries, themselves, had no part to play – certainly in the implementation of relevant policy. However, the evidence persuades me that the Defendant retained overall responsibility. At any stage it could have intervened and Cape Products would have bowed to its intervention. On that basis, in my judgment, the Claimant has established a sufficient degree of proximity between the Defendant and himself. At paragraph 27 of the skeleton argument submitted on behalf of the Claimant the suggestion is made that in this case the degree of proximity between the Defendant and Claimant is central to the analysis of whether, on the facts, a duty of care was owed. I agree. The facts I have found proved in this case persuade me that proximity is established.*"

84. The defendant conceded the argument on whether it was fair and reasonable to impose a duty of care and the Court found the concession to be a correct on the basis that by the late 1950s it was known that exposure to asbestos was linked to a very significant risk of potential fatal illness.

85. Chandler remains under appeal and one can see how the defendant will argue that it subverts the agency argument by simply recasting it as a duty of care case.

Conclusion

86. Chandler represents a significant step, or perhaps more aptly a side-step around the problems with piercing the corporate veil. If it survives the appellant process each case will have to be carefully considered on its facts and a profile drawn up of what

was the parent company's involvement with its subsidiaries. This may be a lengthy and expensive process and that will need to be judged against the value of the claim.

IJD

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