THOMPSONS SOLICITORS

Labour & European Law Review

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FLEXIBLE WORKING

According to statistics published by the Department of Trade and Industry (DTI), far more employees are now aware that they can request to work flexibly than in 2003 when the right was first introduced.

The Second Flexible Working Employee Survey 2005 found that nearly 65 per cent of the UK workforce were aware of the right, compared to 41 per cent two years ago.

The study showed that nearly a quarter of working parents with young children asked to work flexibly over the last two years. In all, 14 per cent of employees made a request.

The survey found that:

- Women were more likely to have made a request than men (19 per cent compared to 10 per cent)
- Women were most likely to request to work part-time, while men were more likely to ask to work flexibly
- Employers are now allowing far more requests – 81 percent compared to 77 per cent in 2003
- Almost one in five employees reported taking time off to care for someone in the last two years, with over half taking time off to look after dependent children

Go to *www.dti.gov.uk/er/emar/errs39.pdf* to access the survey.

A CENTURY FOR LELR

Labour and European Law Review is 100 this month. We're not expecting a telegram from the Queen, but it's a significant milestone all the same.

The first edition, edited by Stephen Cavalier (then head of the ERU and now Client Director), appeared in July 1996. It covered a wide range of topics including new cases on TUPE regulations, equal pay and lesbian and gay rights, among others.

Its purpose then, as now, was to keep trade union officials and their members up to date with key developments in the fields of equal rights, employment, trade union and industrial relations law in the UK and Europe. All complex and fast moving areas.

Although the review has changed in style over the years, the core format has remained much the same with solicitors from the ERU team providing their expert advice in articles and features that focus on key cases as well as wider developments in the law.

We hope that you enjoy the next hundred editions of the review as much as you have told us you that enjoyed the last hundred. If you have any comments, please feel free to get in touch – your views are always welcome.

Victoria Phillips
Head of the Employment Rights Unit

NEWS FROM ACAS

E-LEARNING

ACAS (the Advisory, Conciliation and Arbitration Service) has launched another new e-learning course, this time about the rights of working parents. It covers topics such as:

- Maternity rights and pay
- Paternity leave and pay
- Adoption leave and pay
- Parental leave
- Time off to help dependants
- The right to request flexible working

To learn more, go to *www.acas.org.uk* and click onto the e-learning section.

EMPLOYMENT RELATIONS MATTER

The conciliation service has also produced the second issue of Employment Relations Matter, a quarterly e-mail bulletin written mainly by members of its Strategy Unit. The aim of the articles is to provoke comment and discussion from a wide readership and do not necessarily reflect the views of ACAS itself.

This issue contains three main features:

- Time to put quality back into working life?
- Managing conflict at work – lessons from ACAS
- Bullying and harassment

Go to *www.acas.org.uk/strategy/pdf/6772_ACAS.pdf* to access the bulletin.

ADVISORY BOOKLETS

ACAS has just updated its good practice guide for employers, looking at tackling discrimination and promoting equality.

To access the guide, go to *www.acas.org.uk/publications/B16.html*

It has also produced a booklet on representation at work which looks at the benefits of representation for both workers and employers, and how it might work in practice.

To access the guide, go to *www.acas.org.uk/publications/b15.html*

Employment Regulations Act 2004

More sections of the Employment Relations Act 2004 came into effect on 6 April 2005. These include:

UNION RECOGNITION

- clarifying how the appropriate bargaining unit is to be determined by the Central Arbitration Committee (CAC)
- provisions to appoint a suitable independent person to handle union correspondence with a bargaining unit when the CAC has accepted an application for recognition
- postal voting for workers away from the workplace at the time of a ballot
- confirmation that "pay" does not include pension schemes for collective bargaining purposes
- provisions to speed up the recognition or derecognition process
- giving ACAS the power to require information to settle a recognition dispute

INDUSTRIAL ACTION

- extending the protected period for taking lawful action from eight to twelve weeks ("locked out" days are disregarded when calculating this period)
- introducing new matters that a tribunal has to take into account when assessing whether an employer has taken reasonable procedural steps to resolve a dispute with a union

RIGHTS FOR WORKERS AND EMPLOYEES

- employees have the right not to be dismissed or treated detrimentally because of serving on a jury, including selection for redundancy
- employees dismissed for making a flexible working application can complain of unfair dismissal even when involved in official or unofficial industrial action
- Flexible workers do not need to satisfy the one-year qualification rule for claiming unfair dismissal

TUPE regulations

After a long wait, the DTI has finally published a draft version of the new Transfer of Undertakings (Protection of Employment) Regulations 2005. The Government is now consulting on whether the draft regulations implement the policy decisions it has already taken (and on which it consulted widely).

The regulations (which should come into force on 1 October 2005) are aimed at:

- improving business flexibility
- increasing the transparency of the transfer process
- clarifying the circumstances in which employers can lawfully make transfer-related dismissals and negotiate transfer-related changes to terms and conditions of employment for "economic, technical or organisational" reasons
- giving a significant boost to the Government's promotion of the "rescue culture".

The consultation closes on 7 June 2005. Go to: *www.dti.gov.uk/er/tupeconsultation.pdf* to access the consultation document.

Pay rises for mothers

Following the decision of the European Court of Justice (ECJ) in Alabaster v Woolwich plc and the Secretary of State for Social Security **(LELR 89) last year, Parliament has now approved a new set of regulations to give effect to it.**

Basically the ECJ said that if a woman gets a pay increase between the beginning of the "relevant period" (the eight week period used to calculate her earnings for statutory maternity pay purposes) and the end of her maternity leave, the employer has to go back and include that pay rise in her earnings.

Go to *www.dwp.gov.uk/lifeevent/benefits/ecj_judgement.asp* for guidance on the new regulations.

CORRECTION

In February's LELR (Hollow Victory for Claimants, page 7), relying on advice from the Department of Constitutional Affairs, we wrote that Acas conciliated settlements cannot be registered in the county court. Acas has confirmed that if a settlement is not honoured and the tribunal will not re-open the case, the claimant can instigate county court action for breach of contract. The county court cannot re-open the original tribunal claim.

NOT SO CALCULATING

In unfair dismissal claims, tribunals can make basic awards of up to £8,400, as well as compensatory awards of up to £56,800 for current and future financial loss.

However, the employment appeal tribunal (EAT) has just said in Port of Tilbury (London) Ltd -v- Birch and ors (2005, IRLR 92), that tribunals must not ignore the evidence in front of them, particularly if they want to award more than has been claimed, before deciding on the amount of compensation.

WHAT WERE THE BASIC FACTS?

Mr Birch and three other employees made successful claims of unfair dismissal against their former employer, Port of Tilbury (London) Ltd. However, the tribunal decided that because each had contributed to their own dismissals, their compensation should be reduced by 25 per cent.

The tribunal then made awards to each of the men of between £28,000 and £39,000 (before the reduction was applied), which included loss of pension rights for three of them.

In coming to its decision, the tribunal relied entirely on a booklet called "Compensation for loss of pension rights: Employment Tribunals", although both parties made detailed written submissions about how they should be assessed.

The tribunal rejected their suggestions "*on the basis that neither approach was included in the booklet.*" It awarded one of the men – Mr Talbot – more than he had even asked for.

The employers appealed, saying that both decisions represented errors in law.

WHAT DID THE EAT DECIDE?

And the EAT agreed. It said that, in general terms, assessing awards of compensation in unfair dismissals is essentially a matter for the employment tribunal, unless, as in this case, it becomes clear that the tribunal has gone wrong somewhere.

It said that the booklet was there simply to "*help tribunals when there is little forthcoming from the parties as to how to approach ... assessing a proper compensation of loss of pension rights.*" There was no duty on it to follow the guidelines in the booklet, particularly in situations where the parties put forward credible evidence.

Indeed, in those circumstances, the tribunal was under a duty to consider that evidence first. It therefore allowed the employer's appeals in respect of the assessment of loss of pension rights, and remitted the matter to the tribunal.

WHAT ABOUT MR TALBOT'S LOSS?

The EAT then looked at the appeal in respect of Mr Talbot.

The employment tribunal awarded him a sum for future loss based on a period of five years. This was not only in excess of that proposed by the employer, it was also in excess of that asked for in Mr Talbot's schedule of loss.

The employers argued that it was wrong for an employment tribunal to award more than the employee had claimed for. The trouble was that their legal representatives could not find a case that supported this assertion.

The EAT decided that although employment tribunals are unlikely to award more than an applicant claims, it is not necessarily an error of law to do so (particularly if a claimant is not legally represented).

However, when both parties have the benefit of legal representation (as in this case), the EAT said employment tribunals should only award more than was claimed after having given both sides an opportunity of making submissions.

That was not done in this case and so the EAT allowed the appeal and again remitted the matter back to the same employment tribunal.

UPLIFTING AWARDS

Tribunals have stated for many years that interest cannot be awarded in unfair dismissal cases.

However, in Melia -v- Magna Kansei Ltd the employment appeal tribunal (EAT) has just said that tribunals can award an uplift of 2.5 per cent to compensate claimants whose payments are delayed.

WHAT WERE THE FACTS?

After making a successful claim for unfair dismissal, the tribunal awarded Mr Melia £6,000 compensation for being subjected to a "detriment" (in other words, a disadvantage), as a result of having blown the whistle on his employer. He was also awarded just over £12,000 for unfair dismissal (£840 basic and £11,601.85 compensatory).

WHY DID MR MELIA APPEAL?

Loss of pension rights: Mr Melia appealed against the decision to compensate him solely for the loss of pension rights up to the point when he started making contributions to his new employer's fund, arguing that his loss continued after that. The EAT said the tribunal had not made any errors in law, and so could not alter its decision.

Loss of benefit rights: Mr Melia argued that he would have stayed with the company until 2014; the company said he would probably have left in about 2004. The tribunal decided on 2007, awarding him just over £1,700 for his loss.

However, it then reduced this by 2.5 per cent per annum on the basis that he would receive it as a lump sum and therefore benefit from an "accelerated payment".

Mr Melia argued that as the sum awarded already made allowance for accelerated payment, he was being penalised twice. The EAT said he was not.

Delayed receipt: Mr Melia then argued that if his award was to be subject to a deduction of 2.5 per cent, then he should receive an increase of 2.5 per cent for delayed payments.

The EAT agreed and said there was nothing to stop it from doing so, as part of awarding him with compensation that is "just and equitable", even though interest is not awardable under the statute (see box). Basically this allowed him to receive interest on payments awarded to him, but not yet paid.

Injury to feelings: Mr Melia argued that compensation for his injury to feelings should have been calculated until the date his contract was terminated – 9 November 2001.

However, because tribunals cannot award compensation for injury to feelings in unfair dismissal cases, it had to distinguish between the date when the detrimental treatment ended and "moved to become a matter of dismissal". It said this was in late June, and the EAT agreed.

Reduction of awards: Mr Melia argued that the tribunal should not have reduced his compensatory and basic awards by 50 per cent, on the basis that he accessed confidential personnel files without his employer's permission. He also knew that one of his subordinates had done the same and he had not reported him.

Although his resignation was not connected to this (he was constructively dismissed), the tribunal felt that, as a result of this misconduct and its discovery, Mr Melia would have been dismissed fairly. It therefore felt it was just and equitable to reduce the awards.

The EAT agreed, relying on the House of Lords decision of *Devis -v- Atkins (1977, ICR 662)* which "*allowed a tribunal to take into account evidence of misconduct prior to termination which came to light after the dismissal, and reduce the compensation which would otherwise have been awarded to a nominal or nil amount.*"

SECTION 123 EMPLOYMENT RIGHTS ACT 1996

(1) ***"Subject to the provisions of this section... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."***

a brief overview of

PENSIONED

From 6 April, most people buying a business have to offer a minimum level of pension provision to employees transferred under a sale governed by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE).

In this article, ***Christopher Bunn*** from Thompsons' Employment Rights Unit in London considers the implications for employees of the new Transfer of Employment (Pension Protection) Regulations 2005.

WHAT RIGHTS NOW APPLY?

Under TUPE, the position has always been that occupational pension rights relating to "old age, invalidity or survivors" do not transfer on the sale of a business. Only rights not falling within this definition, such as redundancy benefits and contractual entitlements under group personal pension arrangements, transfer. These rights are unchanged.

Likewise, public sector employees transferred to a private sector company have always had some protection, in that they have had the right to a "broadly comparable" pension arrangement. But in the private sector, companies had been left to sort out what pension provision they should make.

The provisions in the Pensions Act 2004 and the 2005 pension protection regulations now require purchasers to make a minimum level of pension provision for all transferred employees.

WHEN DO THEY APPLY?

The new provisions only apply on a TUPE transfer. In other words, on transfers of a business or sale of assets. They do not apply, therefore, when ownership changes as a result of a sale of shares.

In addition, the business being sold must have an occupational pension scheme already in place immediately before the transfer. Most employers with a defined contribution (money purchase) pension scheme or defined benefit pension arrangement (such as a final salary scheme) in place are, therefore, caught by the regulations.

For the provisions to apply to a money purchase scheme, however, the employer has to contribute to it. This would exclude most cases where the business only offers a stakeholder arrangement for its employees. The only exception is when employers have contributed to the scheme on behalf of active members, although they were not required to do so.

The requirements apply to employees who are active members of the scheme, and those eligible to join the scheme, but have not done so, even if there is a waiting period for joining the scheme that cannot be met due to the transfer.

WHAT MUST BE PROVIDED?

The purchaser of the business must provide a pension scheme for transferred employees, either by offering an occupational pension arrangement or a stakeholder arrangement, subject to minimum conditions.

If the purchaser offers membership of an occupational pension scheme, the criteria for compliance depend on the nature of the scheme offered.

If a money purchase scheme is on offer, the purchaser has to match the employee's contribution, up to the level of six per cent of basic pay ("relevant contributions").

If the scheme is not a money purchase scheme, (for example final salary), the purchaser has three options:

- offer a scheme that meets the minimum statutory standard to enable it to contract-out from the state second pension scheme, known as the reference scheme test; or
- match the employee's contribution to the scheme, up to the level of six per cent of basic pay for each active employee (ie make "relevant contributions"); or
- provide a benefit of at least six per cent of pensionable pay for each year of employment together with any contributions made (with any employee contributions capped at six per cent of pensionable pay)

Alternatively, the purchaser can offer and make "relevant contributions" to a stakeholder pension scheme. In this case, the purchaser is required to match the employee's contribution to the scheme, up to the level of six per cent of basic pay for each active employee.

OFF

HOW IS PAY DEFINED?

Gross basic pay is used to calculate "relevant contributions". In other words, any payments in respect of bonus, commission, overtime and similar payments are disregarded, as are deductions for tax and national insurance.

If the scheme is not a money purchase scheme, and the employer decides to offer a benefit of at least six per cent of pensionable pay for each year of service, the definition of "pensionable pay" can be defined in the scheme documents. Depending on the rules of the scheme, therefore, it may include emoluments such as overtime, bonuses and commission.

WHAT ABOUT DISCRIMINATION CLAIMS?

Discrimination claims may arise if the group of transferred employees is offered a different rate of contribution, or different benefits to existing employees. Most claims are currently on the basis of sex discrimination, but with age discrimination legislation scheduled to come into force from 1 October 2006 it is likely to be very relevant in this context.

For instance, if the scheme offered by the purchaser has an age restriction, transferred employees could not be excluded from joining the scheme. But this could lead to possible claims of discrimination by existing employees who had not been able to join the scheme because of the restrictions.

Unions should therefore alert purchasers to potential discrimination issues during negotiations at the time of the sale to try and get a better deal for their members.

WHAT SHOULD UNIONS AIM FOR IN NEGOTIATIONS?

During negotiations regarding the sale of a business, unions should be aware of the minimum level of contributions that need to be made or the minimum level of benefits that need to be provided for transferred employees and use this as a starting point.

It is a condition of the Pensions Act for the purchaser to comply with these requirements as part of each transferred employee's contract of employment. The Act does, however, enable an agreement to be reached between the transferred employee and the purchaser to contract-out of this provision at any time once the employee becomes an employee of the purchaser.

If the purchaser offers a final salary scheme, and has the choice of the three options regarding benefit design, unions should aim for a benefit of at least six per cent of pensionable pay for each year of employment in addition to any contributions made by the member.

COMMENT

The Government should be applauded for setting a minimum level of pension provision that needs to be provided by purchasers. The problem is that because employers can chose to offer the cheapest option, the level of protection afforded is weak.

If the purchaser currently operates a final salary scheme there is no requirement to also provide membership of that scheme to transferred employees. The purchaser can decide to offer a money purchase or stakeholder scheme.

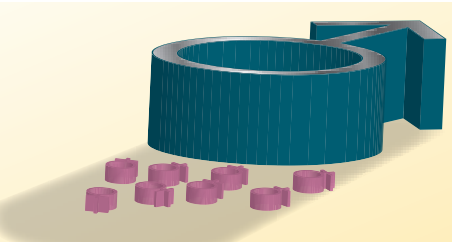
Contributions by the employer to money purchase or stakeholder schemes are dependent on the level of contribution that the employee makes. If the employee does not contribute, then nor does the employer; and even where both employee and employer contribute, the employer is unlikely to contribute above the cap of six per cent.

PROGRESS ON PAY

Indirect pay discrimination can arise in two circumstances. Firstly, when there is a practice that disproportionately affects the pay of women (or men). Or secondly, when there is a group of workers who are predominantly female (or male) but who have less favourable terms than another group of mainly male (or female) workers.

In Home Office -v- Bailey and ors (see *LELR 96* for the EAT decision), the Court of Appeal has said that, even if the claimants are part of a group made up of almost equal numbers of men and women, that did not mean there could not be discrimination. In this case it was because the higher paid comparator group was male-dominated.

The claimants' union (PCS) instructed Thompsons, supported by the Equal Opportunities Commission.



WHAT WAS THE BACKGROUND?

In early 1999, a group of higher executive officers, relying on a 1996 job evaluation scheme, claimed equal pay with three higher grades, all dominated by men. In March 2000 about half the higher executive officers were women. About 2,000 other employees subsequently brought claims against the Home Office on a similar basis.

The employment tribunal decided that there was prima facie (at first sight) sex discrimination which required the Home Office to justify the difference in pay. The EAT, however, said the tribunal had relied on the wrong evidence.

It decided that if there was a practice that stopped women from becoming a member of a particular work group, then it made sense to compare different 'pools' of men and women who can satisfy that provision (as in the case of *Seymour-Smith*, which the tribunal had followed).

But if there was a situation in which the disparity in pay had arisen because of different arrangements for collective bargaining between the claimant and comparator groups, the claimant group had to be disproportionately female (as in the case of *Enderby*) to succeed. This was the approach that the tribunal should have taken in this case.

WHAT DID THE PARTIES ARGUE?

The two women accepted that, to establish indirect discrimination, they had to show discrimination in the pay system.

But they argued there was no basis in law to draw a distinction between different types of cases, as the EAT had done.

They said that the tribunal was entitled to rely on statistical evidence when determining whether there is evidence of prima facie discrimination and was therefore entitled to adopt the approach set out in *Seymour-Smith* in this case.

The Home Office, on the other hand, said that if the disadvantaged group consists equally of men and women, there cannot be a prima facie case of discrimination which requires them to provide objective justification for the pay difference.

WHAT DID THE COURT OF APPEAL DECIDE?

The question for the Court of Appeal was whether the pay practices of the prison service had had a disparately adverse impact on women.

According to the figures, there were six times as many disadvantaged women as men.

The court therefore agreed with the tribunal that the difference indicated by the six to one ratio was plainly significant, leading to a prima facie case of indirect discrimination (unless, of course, it could be objectively justified).

The tribunal was therefore entitled to find that these facts gave rise to discrimination and the employers had to objectively justify the pay gap. It concluded that, even if the "disadvantaged" group consists of both men and women, tribunals can still hold that the employer should be required to justify the difference in pay between the two groups when the discrimination arises from the gender disparity in the comparator group.

The Home Office is seeking leave to appeal to the House of Lords.

MAKING AMENDS

Trade union advisors often draft their members' tribunal claims for them. Unfortunately, the Court of Appeal has just made that job more difficult by deciding in Ali -v- Office of National Statistics (2005, IRLR 201) **that claimants have to make sure they have identified all the right claims and covered all eventualities (either specifically or generally).**

It can be very difficult (and very time consuming) to try to lodge an amendment to remedy an omission later, as this case shows.

WHAT WERE THE FACTS?

Mr Ali, a black African, was unsuccessfully interviewed twice for two different jobs with the Office of National Statistics. He then claimed that he had been rejected because he was black.

In his claim form (the old box one) he wrote that he wanted the tribunal to decide "*whether I have been victimised and discriminated against on racial grounds contrary to the 1976 RRA*".

The factual details that he provided showed a claim of direct discrimination (that he won) but which was overturned on appeal. The employment appeal tribunal (EAT) then sent the case back to the employment tribunal to be reheard.

WHAT HAPPENED SECOND TIME ROUND?

Mr Ali's representative then tried to amend his claim to include "indirect" (as well as "direct") discrimination following new evidence that emerged during the first tribunal hearing.

Mr Ali argued that he had already identified this claim because he had referred to race discrimination generally, and relied on the 1995 case of *Quarcoopome* which said that that was enough to cover both direct and indirect discrimination. The ONS disagreed, saying that it was a brand new claim that was being brought late.

The tribunal took a third view deciding that the amendment could be read into the factual summary in the original claim form, and allowed the claim to proceed. The ONS successfully appealed on the basis that neither party had argued this point so it was not open to the tribunal to adopt it.

The case was sent to yet another tribunal to decide whether the indirect discrimination claim should be allowed under the *Quarcoopome* rule or be allowed late.

WHAT WAS THE QUESTION FOR THE COURT OF APPEAL?

The Court of Appeal had to decide whether it should follow the EAT decision in *Selkent Bus Co Ltd -v- Moore (1996, IRLR 661)* and "*take into account all the circumstances and ... balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it*". This applied if Mr Ali was right.

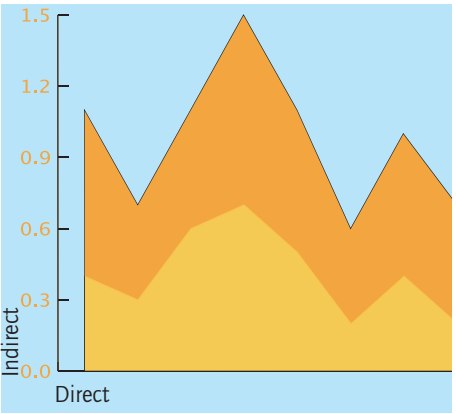
Or whether "*in all the circumstances of the case [the tribunal] considers that it is just and equitable to* [allow the amendment]", taken from s68(6) of the Race Relations Act 1976. This applied if the ONS was right.

WHAT DID IT DECIDE?

The Court of Appeal decided that whether a claim form contains a specific claim can only be judged by looking at the document as a whole. In other words, by looking at the name given to the claim as well as the factual details accompanying it.

If, however, the claim is very general (such as "discrimination"), then the particulars need to be specific so that employers are clear about what claim is being made against them, as direct and indirect discrimination are two separate types of unlawful act. Therefore *Quarcoopome* was wrong on this point and Mr Ali's claim for indirect discrimination was both new and late.

As to the proper test that should be used, the court said that both tests amounted to much the same thing.



Liable for stress

For a claim of workplace negligence to be successful, the claimant has to be able to show, among other things, that their employer could have foreseen their injury. Claimants also have to make their claim within the limitation period – usually three years.

So what are the alternatives for claimants who cannot rely on negligence, for whatever reason? In Majrowski -v- Guy's & St Thomas's NHS Trust the Court of Appeal has now said that employers can be liable for a breach of a statutory duty as well as breach of a common law (or judge-made) duty.

WHAT HAPPENED IN THIS CASE?

Mr Majrowski, a clinical audit co-ordinator, alleged that he was harassed by his departmental manager, Mrs Sandra Freeman. He said she was excessively critical of him; that she refused to talk to him; that she was rude and abusive to him in front of other staff; and that she imposed unrealistic targets for his performance.

Rather than making a claim for negligence (because of evidential and limitation problems), however, Mr Majroswki claimed that the hospital was vicariously liable for a breach of a statutory duty imposed on her under the Protection from Harassment Act 1997.

WHAT DID THE COUNTY COURT DECIDE?

The county court Judge decided that the hospital Trust could not be held liable under the Act for Mrs Freeman's behaviour. He said that the Act was to penalise the conduct of specific and identifiable individuals, and could only "lie against" those individuals, not groups or institutions. That meant that Mr Majrowski could only bring an action against his manager, and not the Trust.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal had to decide whether, in general terms, an employer can be held liable for a breach of a statutory duty (as opposed to common or judge-made law) that is imposed on his or her employee, but not the employer.

It made a number of general observations:

1. That vicarious liability is legal responsibility imposed on an employer, "*although he is himself free from blame, for a tort [civil wrong] committed by his employee in the course of his employment.*"
2. That it covers liability for an employee's unauthorised act (or unauthorised way of doing something) in the course of his or her employment.
3. That the wrongful act has to be very closely connected with what the employee is authorised to do.

The Court of Appeal relied heavily on the decisions in *Lister & Ors -v- Hesley Hall Ltd (2002, AC 215)* and *Dubai Aluminium -v- Salaam & Ors (2003, 2 AC 407)* and said that the essential test should be *"whether, looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable"*. However, there must be a strong connection between what the employee has done and the employment in question.

On the basis of that new, broader test, the Court concluded that "*an employer may be vicariously liable for a breach of statutory duty imposed on his employee, though not on him*".

It also decided that there was nothing in the Act that prevented an employer from being vicariously liable for acts by one of its employees, again as long as there was a close connection between the act and the employment.

> *'an employer may be vicariously liable for a breach of statutory duty imposed on his employee, though not on him'*

COMMENT

Although this case may provide claimants with another potential avenue to go down in bullying/harassment claims, it will not help in the majority of stress cases. These still have to get over the hurdles of foreseeability laid down by the Court of Appeal in *Sutherland -v- Hatton* (*LELR 68*), and reaffirmed by the House of Lords in *Barber -v- Somerset County Council* (*LELR 90*).

In any event, the Banks case (page 11) shows just how difficult it is in practice to prove allegations under the Protection from Harassment Act.

Intention to harass

Stress claims are notoriously difficult to prove, a point reinforced just recently by the Court of Appeal in Banks -v- Ablex Ltd**. But unlike the case of** *Majrowski* **(opposite), the Court decided that Mrs Banks could not rely on the Protection from Harassment Act 1997 to help her.**

WHAT WERE THE BASIC FACTS?

Mrs Banks left her job at the end of 1998 suffering from depression. She claimed that this was caused by the conduct of another employee, Chris Briggs, who she said had sworn at her, shouted at her and assaulted her.

By failing to respond to her complaints, she alleged that her employer had breached the term of trust and confidence in her contract, and that her employer was vicariously liable in negligence for Mr Briggs' conduct.

She claimed that she had no choice but to resign as a result of that negligence.

She also claimed that her employer was vicariously liable for the "statutory tort of harassment" by Mr Briggs under the Act.

For their part, her employer said that they had tried to respond to her claims by offering to move Mr Briggs (who had received an oral warning for swearing at a colleague in early 1998), but that she had her own "independent" reasons for leaving.

WHAT DID THE COUNTY COURT DECIDE?

The Judge rejected Mrs Banks' allegations of assault and said that there was no evidence that Mr Briggs' outbursts were targeted at her as opposed to anyone else.

As for the allegation of harassment, the Judge said that he was not convinced that Mr Briggs knew or ought to have known that that his outbursts would cause her to feel harassed. He did not think Mr Briggs had intended to harm her and that she was, in any event, "*a woman of strong character, not easily upset, a person who gave as good as she got ...*"

The Judge then went on to deal with foreseeability, which she had to establish to win a claim of negligence. Again, he was not convinced, saying that he did not think the company could be held liable for acts committed by an individual employee "*of which they had no knowledge or control either subjectively or objectively.*"

WHAT DID THE COURT OF APPEAL DECIDE?

The court said that under the Act, Mrs Banks had to show that the conduct was intentional and that, by any objective standard, the harasser would know that it amounted to harassment.

Although the Act does not define harassment, the legislation makes clear that it is conduct targeted at an individual which is calculated to alarm that person or cause them distress, and which is oppressive and unreasonable (see box).

In this case, the court found that there was no evidence to suggest that Mrs Banks' employer knew or ought to have known that she was in any way vulnerable. Indeed, the evidence indicated quite the reverse.

Nor was there any evidence that the defendants ought to have foreseen that Mrs Briggs' mental health would suffer as a possible consequence of Mr Briggs' bad temper.

There was no reason to believe that Mr Briggs would not heed the warning given to him in March 1998, and even if her employers could have foreseen a further incident, there was no reason to believe that it would endanger her mental health.

SECTION 1 OF THE PROTECTION FROM HARASSMENT ACT 1997

(1) A person must not pursue a course of conduct
(a) which amounts to harassment of another, and
(b) which he knows or ought to know amounts to harassment of the other.

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

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