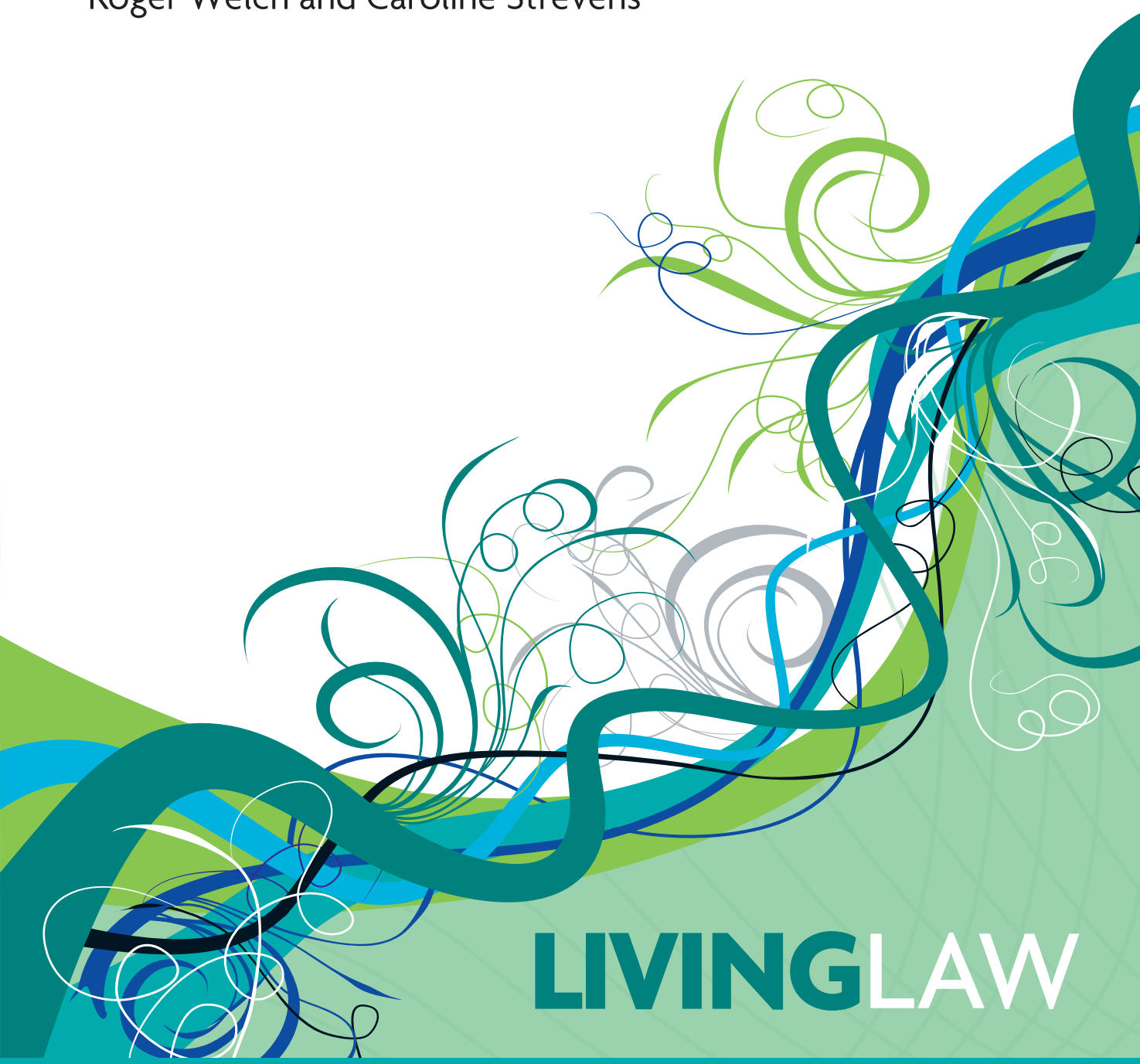
mylawchamber

Legal updates

Practice questions

Employment Law

Roger Welch and Caroline Strevens



LIVINGLAW

ALWAYS LEARNING

PEARSON

Employment Law

'This book presents the issues in employment law in innovative ways and successfully puts the law in its political, social and economic context. The range of different materials stimulate discussion and debate [and it is] attractive to students as it presents the law in a clear and accessible fashion, is topical, and provides many activities to help students to cement their learning.'

Lisa Rogers, Senior Lecturer, Birmingham City University

'The real life context provided in this book is extremely rich and appropriate. It will prove very useful in engaging students in a fuller appreciation of the legal issues raised.'

Carol Kilgannon, Lecturer/Programme leader LLB, Winchester University

Table 3.2 Comparing the contractual and tortious duties of care

Duty of care under the law of contract	Duty of care under the tort of negligence
Duty is broken if the employer fails to take *reasonable* care.	Duty is broken if the employer fails to take *reasonable* care.
Damages reflect loss of earnings resulting from the breach of duty, for example, as a result of a dismissal in breach of contract.	Damages reflect both loss of earnings and the pain and suffering the employee incurs as a result of the breach of duty.
The employer incurs liability even if the employee does not suffer an injury.	The employer will not incur liability if the employee does not suffer an injury.

objective one, any dismissal must be found by a tribunal to be unfair without further argument being necessary.

The following two cases illustrate the operation of s. 100 ERA 1996. Normally, a serious and imminent danger will arise from the state of the workplace or the equipment an employee is required to use. However, in *Harvest Press Ltd* v. *McCaffrey* [1999] IRLR 778, the danger was in the form of the claimant's colleague. McCaffrey was abused by this colleague after McCaffrey had complained about his behaviour and, fearing a physical assault, McCaffrey left his night-time shift. He subsequently phoned his manager stating that he was not prepared to return to work unless the abusive colleague was removed or dismissed. The employer decided that McCaffrey had broken his contract by refusing to work and dismissed him. The EAT upheld the tribunal's decision that McCaffrey had been automatically unfairly dismissed under s. 100 ERA 1996.

Case Summary

In *Balfour Kilpatrick Ltd* v. *Acheson* [2003] IRLR 683, a group of workers collectively left their workplace after it had become dangerous as a result of being flooded through a heavy rainfall. However, four days after the flood the workers were still refusing to return to work even though the weather had improved and the workplace had largely dried. The EAT confirmed that there was no reason why s. 100 could not cover a collective walkout. However, in the circumstances of the case, the men had lost the protection of s. 100 in refusing to return to work once it was no longer reasonable for them to continue to believe that the state of the workplace posed a serious danger.

Case Summary

Breach of statutory duties and strict liability

Legislation and statutory instruments, as well as the common law, have always had a large part to play in promoting health and safety at work by providing detailed regulation of particular types of work and workplaces. Typically, such regulation is part of the criminal law and employers can be prosecuted for being in breach of statutory duty. Moreover, in contrast with the common law, some statutory provisions impose strict liability. This means that employers can be legally liable even where they can show that have taken reasonable care. An example of this is provided by s. 14 of the old legislation covering factories.

Case Summary

Section 14 of the Factories Act 1937 imposed a duty on employers to fence machinery securely so as to prevent employees from coming into contact with dangerous parts of it. In *John Summers & Sons Limited* v. *Frost* [1955] AC 740, Frost was seriously injured whilst operating an unfenced machine. It was held that s. 14 imposed strict liability so that the employer was in breach of that duty even though the machinery in question could not have operated if it had been fenced. An employer would not normally be regarded as negligent with respect to a failure to provide safety devices where doing this would render equipment commercially useless. However, where a statutory duty imposes strict liability a failure to comply with it will render an employer legally liable irrespective of the consequences that proper compliance would generate.

This case also illustrates that some statutory duties impose civil as well as criminal liability on an employer. Where this is so, an employee who is injured as a result of an employer's failure to comply with a specific statutory duty may bring an action in tort to recover damages for the injuries that the employee has sustained. Typically, where breach of statutory duty does generate civil liability then the defence of contributory negligence, as explained above, will be available to an employer. For example, if an employee, who removed a safety guard supplied by an employer, was consequently injured, any damages awarded to that employee would be reduced on grounds of contributory negligence.

The relevant provisions in a statute or a statutory instrument will specify whether it is intended that employees should be able to sue for breach of statutory duty. For example, the Factories Act 1937 has been replaced by a number of regulations, which regulate all types of workplaces, including the Provision and Use of Work Equipment Regulations 1992, SI 1992/2932 and the Management of Health and Safety at Work Regulations 1999, SI 1999/3242. The former expressly imposes both criminal and civil liability whereas the latter is solely part of the criminal law.

One major change to the law, implemented by the Management of Health and Safety at Work Regulations, was the imposition of a duty on employers to carry out risk assessments of the ways in which work is being carried out. Where appropriate, employers should decide on and implement action to reduce any risk of injury to the lowest acceptable level. If an employer knows that an employee is pregnant then the employer must carry out a risk assessment to ascertain if there is anything about the workplace or the job the employee is employed to do which constitutes a risk to the health and safety of the employee or her child. If this is the case then the employee should be provided with alternative work to do. If it is not possible to provide alternative work then the employee should be suspended on full pay for as long as is necessary to protect her and her child.

It should be noted that regulation 11 of the Provision of Use of Equipment Regulations replaces s. 14 of the Factories Act 1937. However, regulation 11 requires suitable safety devices to be provided 'to the extent that it is practicable to do so'. Therefore, it may be that regulation 11 imposes a less strict duty than that which was contained in s. 14. Even if this is the case, the regulation is still requiring an employer to do more than is required where the legal duty is only to do what is *reasonably* practicable.

Criminal liability

Possibly the most well-known piece of health and safety legislation is the Health and Safety at Work Act (HSWA) 1974. This Act is part of the criminal rather than the civil law. Section 2 of the HSWA lays down duties requiring employers to do what is

reasonably practicable to ensure the health, safety and welfare at work of all employees. These duties therefore reflect the common law duty to take reasonable care, which is explained above. Essentially, as a result of s. 2 HSWA, negligence by an employer is a criminal offence as well as a tortious act. However, unlike the tort of negligence, enforcement action can be taken against an employer even though, as yet, no employee has suffered injury.

negligence by an employer is a criminal offence as well as a tortious act

Employers can be prosecuted for a breach of a statutory duty by a health and safety inspector, who is employed by the Health and Safety Executive (HSE). This body was established by the HSWA to oversee and monitor the working of health and safety law (see Chapter 1). Although, enforcement action by a health and safety inspector can result in an employer being fined or even sent to prison, it is much more common for health and safety inspectors to serve an improvement or a prohibition notice. A prosecution will only take place if the notice is not complied with.

A prohibition notice will have the effect of prohibiting a workplace or equipment from being used until the safety requirements specified in the notice have been implemented. Prohibition notices may only be issued where an inspector considers there is a risk of serious personal injury. Prohibition notices may take immediate effect where the risk is imminent. An improvement notice may be issued in any situation where an inspector considers that the employer is in breach of a statutory duty. The employer must be given at least 21 days to carry out the improvements specified in the notice.

Employers may appeal to employment tribunals against the serving of a notice, but a failure to comply with it is a criminal offence punishable by fine or imprisonment. If the duty is strict, it is no defence for the employer to argue that there have been no previous accidents. For example, in *Murray* v. *Gadbury* (1979), in breach of the Agriculture Machinery Regulations 1962, a farmer had used an unguarded cutter for 26 years without incident. His appeal against the serving of an improvement notice failed as the duty to provide a guard was mandatory. However, in such circumstances, it will not be appropriate to serve a prohibition notice. In *Brewer & Sons* v. *Dunston* (1978), an unguarded hand guillotine had been used for 18 years without incident. An appeal against the serving of a prohibition notice succeeded as it could not be established that there was a risk of serious personal injury.

Case Summary

If a breach of statutory duty cannot be established then an appeal by an employer against the serving of a notice must be upheld. For example, in *Associated Dairies* v. *Hartley* [1979] IRLR 171, an improvement notice was served under s. 2 HSWA which required the company to provide free special footwear to 1,000 employees. It was held that the cost involved in doing this outweighed the risk to employees and, therefore, the company was not in breach of s. 2 as this only requires employers to do what is reasonably practicable.

Case Summary

Companies will be directly responsible for any breach of duty if the actual individual at fault was a director or manager. The individual(s) concerned can also be prosecuted. Companies may incur vicarious liability for breach of statutory duty on the basis of the law as explained above. Moreover, under s. 7 HSWA, employees owe a duty of reasonable care with respect to the health and safety of themselves and any other person in the workplace.

There are two issues arising from the employer's personal duties under both contract and tort that are worth highlighting as particularly important in the contemporary workplace: these are the issues of workplace stress and bullying.

Workplace stress

As you can see from the statistics provided below, research has established that workplace stress is a major contemporary issue in the world of work.

Key stats

Research on workplace stress was conducted in 2000 in Bristol and was based on a sample of 17,000 respondents. Some 20% of this sample reported high or very high levels of stress resulting from their jobs. Stress levels were highest in the 35–55 age groups and increased with levels of education and occupations linked to educational qualifications. For example, 41.5% of the sample who were teachers, and 31.8% of those who were in nursing, reported high stress levels, as did 26.7% of professional managers. Stress levels were low, for example, in catering where only 6.8% reported high stress. None of the respondents in hair and beauty reported high stress levels.

Source: The scale of occupational stress: A further analysis of the impact of demographic factors and type of job, by Andrew Smith, Carolyn Brice, Alison Collins, Victoria Matthews and Rachel McNamara, Centre for Occupational and Health Psychology, School of Psychology, Cardiff University. Research report prepared for the Health and Safety Executive.

Case Summary

Barber v. *Somerset County Council* [2004] ICR 457 is the leading authority for setting out an employer's responsibilities to take reasonable action to ensure employees do not suffer psychiatric injury as a result of workplace stress. In this case, the Law Lords held that the Council was in breach of its duty to Barber where it had become aware that his difficulties at work were having an adverse effect on his mental health, but had taken no steps to help him. Barber was a teacher who regularly worked 61–70 hours week and had complained of work overload to the deputy head teacher. He was subsequently absent from work for a three-week period and his absence was certified by his doctor as being due to stress and depression. On his return to work no steps were taken to reduce his workload. Finally, Barber left the school after losing control and shaking a pupil. Subsequently, Barber was unable to work as a teacher, or to do any work other than undemanding part-time work.

In upholding Barber's appeal, the Law Lords generally approved the guidance provided by the Court of Appeal in the case for determining whether stress-based claims should succeed. The key issue is whether psychiatric injury to a particular employee is reasonably foreseeable irrespective of whether such injury was foreseeable in a person of 'ordinary fortitude'. In other words, employers should take into account whether an employee is particularly susceptible to suffering from stress, even though other employees doing the same job under the same conditions would not be. Relevant factors include:

- the nature and extent of the work being undertaken – an employer is required to be more alert to the danger of stress if an employee is being overworked in a job which is intellectually or emotionally demanding;
- any signs of stress exhibited by the employee such as unusual irritability, tiredness which could be caused by lack of sleep and/or an inability to concentrate.

Employers should also realise that harm to health can become foreseeable where an employee uncharacteristically takes regular or prolonged absences from work even if he or she does not complain of stress. However, even though employers may have responsibility for taking the initiative, it is clear that if an employee is suffering from stress it is in the employee's own interests to inform the employer accordingly.

Bullying

The following statistics demonstrate the extent to which bullying in the workplace is an important problem. Interestingly it is older rather than younger workers who appear more likely to be the victims of bullying, and bullying appears to be more prevalent in the professions.

Key stats

Three and a half million people (14% or one in seven of the workforce) say they have been bullied in their current job according to a YouGov poll for the TUC. Just over 20% (one in five) say that bullying is an issue where they work.

Bullying is more likely in the public sector where 19% say they have been bullied compared to 12% in the private sector and 8% in the voluntary sector.

Bullying appears to be most common in professional jobs as 16% of people in such jobs reported that they had been bullied. According to the TUC, this may reflect the large number of professional and associate professional jobs in the public sector such as teaching, and across the NHS.

Men are more likely to be bullied (16%) than women (12%), and 45–54 year olds (19%), followed by 35–44 year olds (17%) are the age groups most likely to be bullied. The 25–34 year olds are the least bullied (8%).

It is not the low paid who are most likely to say they are bullied. Those earning less than £20,000 report much less bullying than those earning between £20,000 and £60,000 (17%). But among those earning above £60,000 only 7% cent say they are bullied.

Source: YouGov poll for the TUC published 5 September 2008, **http://www.emplaw.co.uk/lawguide?startpage=data/12maroo.htm**

Bullying can overlap with discrimination law in that it may take the form of sexual or racial harassment, for example. This type of bullying is covered by the Equality Act 2010 and will be examined later (see Chapter 7). Given that age appears to be a factor, bullying could also be a product of age discrimination. On the other hand, it may be that older employers, through their greater experience of work, are better at recognising that they are the victims of the more subtle forms of bullying behaviour such as unreasonable pressure to complete a job by a particular deadline. However, as the *Green* case shows (see below), bullying need not be based in discriminatory attitudes for an employer to incur liability, as the ordinary common law principles of tort and contract also apply.

Out and about

In understanding how the law works, it is valuable to appreciate the different forms that bullying at work can take, and to consider the steps that an employee may take to secure protection from the employer to prevent further acts of bullying from taking place.

The following website is useful for these purposes: **http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG_10026670**

When visiting this website consider the following questions:

1. What examples of bullying at work did you identify?
2. What informal action would you take if you were a victim of bullying by colleagues at work?
3. In what circumstances would you consider taking formal action internally, that is, within your employing organisation?
4. What do you think formal action would consist of?

Based on the law as explained so far, what types of legal claims do you think you could bring if a complaint to your employer of being bullied did not result in the bullying coming to an end?

Case Summary

In *Green* v. *DB Services Ltd* [2006] IRLR 764, Green had been subjected by a group of women to a relentless campaign of mean and spiteful behaviour designed to cause her distress. In presenting her evidence Green provided the following examples of the types of bullying behaviour to which she had been subjected:

- ignoring me or staring silently at me, often with their arms crossed; this was done in a way that was plainly intended to intimidate and unnerve me;
- greeting and acknowledging other members of the secretariat department in a very overt manner, in order to highlight the fact that they were not speaking to me;
- excluding me from conversations with other member of the secretariat department by either talking over me or pretending they could not hear anything I said;
- excluding me from group activities to which every other member of the secretariat department would be invited, typically when booking restaurants for departmental lunches;
- waiting for me to walk past the area of the office in which they sat before bursting out laughing;
- making crude and lewd comments that made me feel uncomfortable;
- interfering with office administration by removing my name from circulation lists, hiding my post from me and removing papers from my desk.

It was held that the company was in breach of its duty of care to Green in failing to take any adequate steps to protect her from such behaviour. Green's line managers had known or ought to have known what had been going on, and the bullying had given rise to a foreseeable risk of psychiatric injury. Green was granted general damages of £35,000, and £25,000 to cover the period in which she would not be able to work in the future as a result of the psychiatric injury she had suffered.

Owen J identified the following key factors in determining whether an employee could recover damages as a result of being bullied at the workplace: