has the Enterprise and Regulatory Reform Act made a real difference?

23 June 2016

Three years have passed since the Enterprise and Regulatory Reform Act 2013 was passed with the express intention of reducing the burden of health and safety legislation on business. Section 69 of the 2013 Act prevents employees from suing their employers under regulations passed under the Health and Safety at Work etc Act 1974. Some of those regulations were passed in 1992 implementing a number of European Directives and others have been passed since. Breach of the regulations continues to be a criminal offence (although rarely ever enforced) but they are no longer actionable in the civil courts. The practical effect of the reform is that most employers' liability cases are now governed by the common law and not the generally more exacting standards of the regulations. Given that the 2013 Act only came into force on 25 April 2013 and only applies to accidents occurring after 1 October 2013 the first cases involving the new legislation are only just reaching the courts.

Has the legislation made a discernible difference?

There are a number of areas in which the reforms are undoubtedly making it much more difficult for claimants. The obvious instance is where regulations imposed strict liability. For example, where an employee was injured by defective equipment, previously the employee only had to prove that the equipment which caused his injury was defective. Now the employee has to show that the employer failed to take reasonable care to provide safe plant and equipment. This issue arose in a case in which I

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was counsel for the defendant at the end of May 2016. The claim was brought by a school teacher who walked into a staff room in a hurry. She said that the automatic sensors did not trigger the lights to come on and as a result she walked into a partition (which she knew was there – having worked at the school for over 20 years) and fell injuring herself. Previously this claim would have been brought under the Provision and Use of Work Equipment Regulations 1998 on the basis that the sensor was defective and liability strict. Although some attempt was made to argue that these regulations should inform the court as to what was reasonable in the circumstances, ultimately it came down to a question of whether the sensor was defective and whether the school knew or ought to have known about the defect and repaired it before the accident occurred. On these unpromising facts the judge dismissed the claim on the grounds that the sensor was not defective (the partition was 2 meters inside the door and the claimant accepted that the light ultimately did come on – she said 45 to 60 seconds later although the judge found it came on a matter of a second or so after she came into the room). No question arose as to whether the school knew or ought to have known of any defect and therefore whether or not reasonable care had been taken.

Other than the issue of strict liability the most significant impact of the 2013 Act is likely to be on regulations which had the effect of shifting the burden of proof onto the defendant to show that it was not reasonably practicable to prevent something happening. So, for example, where an employee was injured as a result of manual handling the burden was on the employer to show that it was not reasonably practicable to avoid the manual handling operation and, if it was not, that he had reduced the risk if injury to the lowest level reasonably practicable. If the claimant could point to one measure which could have been taken to reduce the risk to the claimant the defendant usually found itself in difficulties. Now the burden of proof does not shift: the claimant has to prove that the defendant failed to take reasonable care.

Two recent cases in which I was instructed were won by the claimants on the basis of the law as it stood under the old regime. The first case involved a primary school which had a pupil who was disabled and required some manual handling. Risk assessments had been carried out and great lengths gone to, to ensure that both the child and staff were safe. The judgment made it clear that the school had acted reasonably. However a teacher injured her back whilst caring for the child and, because the school could not discharge the burden of showing that it had reduced the risk of injury to the lowest level reasonably practicable, the claimant succeeded; the judge found that a hoist could have been used and that the school had not provided enough evidence to prove that this had not been reasonably practicable.

The other case in which I was instructed involved personal protective equipment where there existed a particularly stringent regime which could lead to absurd results. A local authority had provided gardening gloves to its public realm operatives having consulted with staff and unions (who incidentally subsequently supported the claimant's claim). All agreed on and were happy about the gloves which they considered were most suitable for the work. The claimant suffered a needle stick injury from a hypodermic needle which he had not noticed in a pile of leaves and twigs. He argued that the gloves were not suitable. It was not enough for the defendant to argue that it had taken reasonable care: it lost even though the alternative was a gauntlet which was so tough that for the overwhelming majority of the operatives' work it was too rigid to use. Both these cases were governed by the old regime and, if decided under the new, would probably have been decided differently as the test would have been whether reasonable care had been taken.

There are few reported cases since the 2013 Act which have shed light on the attitude of the courts to the reforms. In one Scottish case (Gilchrist v Asda Stores Ltd [2015] CSOH 77) counsel for the claimant ('pursuer') argued that as employers remain under a statutory duty to comply with health and safety regulations and that those duties should define the scope of duties at common law. She argued that

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statutory duties remained relevant as evidence of standards expected of employers in civil cases and that an employer who breached a regulation and was committing an offence could not be acting reasonably. Counsel for the defender submitted that the 2013 Act must have some content but, according to the judge, "*did not expand on his argument*" and for this reason the judge accepted the pursuer's arguments. The decision does not set any precedent and the arguments about the law were more or less immaterial to the decision as the judge found that the stool the employee was standing on was not unsafe to use for standing on and that she had not fallen off it because she was being required to undertake a task for which it was unsafe. Counsel for the defender probably did not put a great deal of effort into responding to the pursuer's legal arguments because there was a simple answer to the case which meant that it was unnecessary.

What conclusions can be drawn?

Although the first cases have now started to come before the courts we have yet to see any significant reported cases commenting on the new regime. From the case of Gilchrist and my recent case under the new regime involving the school teacher and light sensors it is clear that it will be argued strongly by claimants that the old regulations still apply and inform the common law duty of care owed by employers. In neither Gilchrist nor my case were these arguments relevant to the outcome. However they do have some force. Thus, for example, where regulations require the risk of injury to be reduced to the 'lowest level reasonably practicable' there is a powerful argument that a correspondingly high standard of care should be imposed on an employer under the common law.

Another example of the ongoing impact of regulations is the obligation to risk assess (Regulation 3 of the Management of Health and Safety at Work Regulations 1999/3242): an employer who fails to risk assess and then to be able to show that he has taken reasonable steps to address the risk of injury which the assessment has, or should have, identified will still have an uphill battle in court. Nonetheless the new legislation has made it easier to defend employers' liability claims in two key respects which will benefit those liable to pay out in such claims. First, where regulations formerly imposed strict liability, the duty has been replaced by the obligation to take reasonable care and, secondly, where regulations formerly placed the burden of proof on defendants to show they had done all that was 'reasonably practicable' that obligation has now gone.

The picture emerging is a mixed one and the battle to shape the new landscape will continue to be hard fought between claimants and defendants.

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Assessing the scope of employers liability – Chell v Tarmac (https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2020/11/assessing-the-scope-of-employers-liability-chell-v-tarmac)

These were the opening remarks of Mr Justice Martin Spencer when handing down his Judgment in the recent case of Andrew Chell v Tarmac Cement and Lime Limited [2020] EWHC 2613, the latest in a series of appeals dealing with the scope of vicarious liability.

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Noise-induced hearing loss claims – documentation and the expert engineer (https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2016/03/defending-yourself-against-unwelcome-noise-induced-hearing-loss-claims)

Guest writer, Finch Consulting Senior Consultant Teli Chinelis applies his expertise in preparing engineering reports in relation to noise-induced hearing loss (NIHL) claims to explain information that is required from the claimant and information that is required and is advisable to be retained by employers, in order to ensure that claims can be fairly represented.

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Kuoni referred to the CJEU by Supreme Court for clarification - possible impact on breach of contract, vicarious liability and assumption of responsibility claims for sexual abuse and assault (https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2019/07/kuoni-referred-to-the-cjeu-by-supreme-court-for-clarification-possible-impact-on-breach-of-contract-vicarious-liability-and-assumption-of-responsibility-claims-for-sexual-abuse-and-assault)

We were hoping to be able to give you some interesting insights following the judgment of X v Kuoni Travel Ltd but that will have to wait for another day.

View (https://www.brownejacobson.com/insurance/training-and-resources/legal-updates/2019/07/kuoni-referred-to-the-cjeu-by-supreme-court-for-clarification-possible-impact-on-breach-of-contract-vicarious-liability-and-assumption-of-responsibility-claims-for-sexual-abuse-and-assault)

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As part of the SRA's 'Looking to the Future' programme, from November 2019 solicitors who provide reserved legal activities who wish to practise on their own have the option to go freelance. Freelance solicitors will be a new class of solicitor.

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Ian Miller
Barrister at 1 Chancery Lane

+44(0)207 092 2900 (tel:+44(0)207%20092%202900)

Email Ian (mailto:clerks@1chancerylane.com)

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