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9 GOUGH SQUARE

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EMPLOYMENT LAW BULLETIN

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AGENCY WORKERS
has that ship finally sailed?

Ben Rodgers

In ***Ferryways NV v Associated British Ports* [2008] EWHC 225 (Comm)** the chief officer of the Claimant's ship died in an accident on board, involving a tugmaster vehicle provided by the Defendant port operator. The Claimant paid compensation to the officer's next of kin on the basis that it was his employer. It sought to recover those sums from the Defendant. The Defendant argued that the Claimant was not the employer of the deceased, so it had not been obliged to pay death benefits, and so was not entitled to recover those sums.

Associated British Ports ("ABP") averred that the true employer was a crew management company – a kind of nautical employment agency. So the scene was set for an unusual argument: the end user was trying to convince the court that it, rather than the agency, was the employer. It succeeded. The reason for its success is of interest here. Teare J held that Ferryways was the undisclosed Principal of the crew management company and as such was the officer's employer.

Undisclosed Principals

In an agency arrangement there is a Principal, an agent, and a third party. The third party deals with the agent, but in so doing creates obligations to and from the Principal. In most systems of law the identity, or at least the existence, of the Principal must to be known to the third party in order to establish the necessary authority to make contracts on the Principal's behalf. The Common Law, on the other hand, permits the Principal to be unknown to the third party: the phenomenon of the undisclosed Principal.

Where intervention by the undisclosed Principal would be inconsistent with the terms of the contract, express or implied, he cannot take the benefit or bear the burden of the contract as an undisclosed Principal. Whilst the Principal must intend to enter into the contract as undisclosed Principal, the parties' intentions are to be judged objectively.

Undisclosed Principals in the employment context

In ***Dacas v Brook Street Bureau Ltd* [2004] EWCA Civ 217** the Claimant did not argue that the employment agency acted as the end user's agent. The idea was dismissed without argument (para. 61). It has generally been thought that personal contracts could not be entered into by an undisclosed Principal: see ***Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199**. For this reason, it does not seem to have been seriously argued that an employment

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EMPLOYERS' LIABILITY
pirates of the high seas

Catherine Atkinson

All employers have a duty to exercise reasonable skill and care for the safety of their employees. But what does that duty entail when your employees are faced with the threat of piracy? Employers can be liable for the actions of third parties if it is established that there was a real risk which they knew, or ought to have known existed and that they failed to take reasonable steps to prevent or minimise that risk.

Pirates are not a risk that health and safety officers in most industries would come across, but for the shipping industry in many parts of the world, piracy is a real concern. Could the threat of piracy be significant enough to constitute a real risk? In ***Longworth v Coppas International (UK) Limited*** [1985] SC 42 employers were not found liable for the death of one of their employees who had been killed when hostilities broke out in Basra where he was working in 1980. The Court found that the missile attack on the complex in which the deceased was working had not been very likely to happen. Therefore, the Defendant's failure to evacuate their employees did not constitute a breach of their duty. While piracy is down from its peak in 2003, which saw 445 attacks, it is not a problem that is going away. In 2006 there were 239 attacks and in 2007 there were 263. In areas where piracy is rare it may not constitute a real risk. It may further be argued that some ships are less at risk than others depending on their size and speed. The territorial locations of piracy incidents has shifted in the last decade and presently coastal areas such as Somalia, Nigeria and the Gulf of Aden are posing particular threats. In hotspots like those it is likely that pirate attacks would be found to constitute a real risk rather than just a mere possibility.

What constitutes reasonable actions needed to protect against the actions of third parties? In ***Charlton v The Forrest Printing Ink Co Ltd*** [1980] IRLR 331 the Court of Appeal found that the Claimant's employers were not liable for injuries suffered when he was attacked by robbers while collecting money from the bank to pay the company's wages. The Defendant was found to have discharged its duty, as managers had been advised of the need to take precautions, such as varying the route, using different methods of transport and sending different people. The Claimant had not acted upon this advice. The Court of Appeal rejected the first instance finding that the Defendant's failure to employ a security firm to deliver the monies constituted a breach of their duty. In his leading judgment Lord Denning cited two further cases involving attacks on employees by robbers; ***Houghton v Hackney Borough Council*** III Knights Industrial Reports 615 and ***Williams v Grimshaw*** III Knights Industrial Reports 610. In both of those cases, although the duty of care on the employer was recognised, the injured person failed because the judges found that there had been no want of reasonable care on their part. Similarly, in *Charlton* Lord Denning found that *'The employers did what was reasonable in the circumstances to eliminate the risk – although it was there – and no more could be expected of them'.*

In ***Rahman v Arearose Ltd*** [2001] QB 351 the Defendant operators of a fastfood chain were found to be liable for the personal injuries suffered by a manager who was badly beaten by gang members. The Defendant was found to have failed in its duty to provide adequate protection for its staff as, despite previous incidents of violence against employees, reasonable security measures were not put in place. The door to the kitchen area was unlocked and opened both ways, there were no monitoring screens or warning signs to the public that the premises were monitored, and the staff were not allowed to use the panic button.

In ***Tarrant v Ramage (The Salvital)*** [1998] 1 Lloyd's Rep. 185 it was acknowledged that the duty to protect employees was not absolute, and working in a war zone entailed risks that could not be fully guarded against. In that case, however, ship owners and master's employers were found to be in breach of their duty and liable for injuries the Claimant suffered when he was working on a tug which was hit by a missile in the Gulf. It was found that in order to discharge their duty there

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should have been written instructions on the risk of missile attacks and how best to minimise the risk of a strike. Had such written instruction been given, the Court considered that the tug would have been moved to the radar shadow of the tanker that it was assisting and not been hit.

It appears clear that actions must be taken to minimise the risk of pirate attack, but in the event of one (assuming all reasonable actions were taken to avoid it), are employers liable to pay ransoms demanded or responsible for the injuries that occur as a result of failure to meet demands? Not to bargain or pay ransoms is explicit government policy in the United Kingdom and the United States, and it is arguable that it is not legal to do so, as anti-terrorist legislation prohibits the payment of money if there is a chance that it could result in funding terrorism. While it could be argued that the majority of ransom cases encountered by the shipping industry are extortion rather than terrorism, public policy consideration make it unlikely that employers will be found liable for injuries suffered when ransoms are not paid, as long as all reasonable efforts were made to avoid that situation occurring.

In order to discharge their duty to employees, ship owners must take reasonable steps to prevent or minimise the threat posed by pirates. It could be argued that the provision of armed guards would constitute reasonable preventative action, however, their presence could arguably escalate the risks to employees in the event of a pirate attack. As in *Tarrant*, it is likely that reasonable steps will include written instructions and strategies as to how to minimise the risk of pirate attacks and what should be done in the event on an attack. It may not be possible to prevent pirate attacks, but employers must take all reasonable steps to avoid them and any failure to do so is likely to result in being held responsible.

Catherine Atkinson

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agency acts as agent for the end user in entering into contracts of employment with workers.

Following *Ferryways v ABP* it is arguable that an employment agency that is retained by an end user for the provision of temporary staff becomes the end user's agent. It enters into contracts with workers as agent for the end user, who is an undisclosed Principal. The contract is thus between the end user and the worker – who is therefore an employee within the 1996 Act. That is what the Claimant successfully argued in *Ferryways*.

In *Dacas* the employment agency argued that it did not enter into an employment contract with the worker. It just paid her. But if the agency pays the worker as agent for the end user, which controls the work, then the right to control work and the duty to pay wages lie in the same party. This would presumably satisfy even Munby J's requirements for the existence of an employment relationship.

Conclusion

Ferryways shows that one can become an employer through an agent as an undisclosed Principal, in order to enjoy the benefits of being an employer. What is sauce for the goose is sauce for the gander. If end users can enjoy their agents' rights, they can bear their agents' obligations.

Unfortunately, *Ferryways* settled before reaching the Court of Appeal, but another opportunity for that court to examine this area should arise soon. However, the recently adopted Agency Workers Directive, which must be implemented within 3 years, and the agreement reached in the UK between the government and social partners, mean that these arguments may in time be of reduced importance.

Grahame Aldous QC appeared in Ferryways v ABP;
John Foy QC appeared in Dacas v Brook Street Bureau

Ben Rodgers

Employment Seminar

Discrimination Law update

Susan Belgrave and Philip Jones

Topics:

- Disability post *Malcolm*
- Whither the *Heyday litigation?*
- The Equality Bill
- Conflicting discrimination strands
- Case law update

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PHILIP JONES

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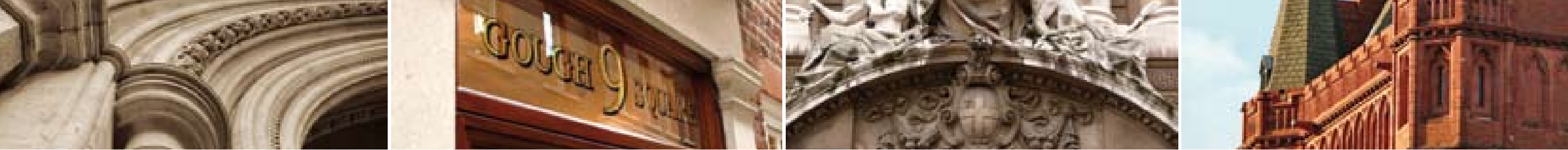
COST
£20.00 + VAT (£23.50)
1 hours CPD

DATE
29th January 2009
Time: 5.30 - 6:30pm
Refreshments will be provided
Limited to 12 places

Please contact Tim Sprules on 020 7832 0500 or email tsprules@9goughsquare.co.uk if you wish to attend or have any queries



For whom the whistle blows

Susan L. Belgrave

It is an unlikely scenario. You read your local newspaper and recognise the description of an alleged rapist as a new student at the college where you teach whom you have recently interviewed on your own. Fearing for your safety, as well as that of your colleagues, you notify the police of your suspicions and tell your employer what you have done. Your employer's reaction is unsympathetic and distressing. You decide you cannot work there any longer but are mindful of your teaching commitments.

After lodging a complaint you resign the following term and bring a whistleblowing claim before the employment tribunal. These are the brief facts of ***Hibbins v Hesters Way Neighbourhood Project EAT /0275/08 nyr***. The Employment Tribunal accepted the Respondent's argument that the alleged wrongdoing was not committed by them or anyone for whom they were responsible, and thus rejected the claim on the basis that the facts did not fall within the mischief of the public interest disclosure provisions of the Employment Rights Act 1996.

Ms. Hibbins alleged that her disclosure to the police of the student's mobile telephone number and address amounted to a protected disclosure falling within the provisions of section 43B of the 1996 Act, as did the subsequent disclosure of these facts to her employer. Section 43 B provides:

'In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –

(a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…'

The EAT reversed the employment tribunal's decision and concluded that the identification of the wrongdoer as 'a person' expands the legislative grasp to include all legal persons without being limited to the employer or work colleagues. Mr. Justice Silber stated the legislation has to be construed in the light of its aim of encouraging responsible whistleblowing, and should be interpreted so far as one possibly can to provide such protection rather than to deny it. This was also supported by a close analysis of the wording of the statute which refers to wrongdoing by 'a person' and action by 'the employer'. The use of the term 'person' obviously had to be interpreted in the wide sense that it normally takes as any legal person. A narrow interpretation would lead to absurd results and would not, for instance, protect an employee who blew the whistle in relation to wrongdoing by a customer or client of his employer. What would happen to an employee who, during the course of his work for a customer or client of his employer, discovered fraudulent activity on the part of a client and reported that activity to a regulatory authority? In such circumstances there was a real prospect that an employer might victimise the employee who caused them to lose a valued client/customer. If the Respondent's argument were accepted, the employee would be without a remedy. The EAT concluded that there was no limitation whatsoever on the people or the entities whose wrongdoings can be subject of a protected disclosure. The case has been remitted to a differently constituted employment tribunal to consider other defences raised by the employer.

Susan L. Belgrave

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