

EMPLOYMENT

Vicarious Liability – two important judgments from the UK Courts

5 May 2020

Two important judgements have recently been handed down in the UK in relation to vicarious liability.



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On 18 February 2020, the Court of Appeal of England and Wales in **Haringey London Borough Council v FZO [2020] EWCA Civ 180** upheld a High Court decision that a school was vicariously liable for the sexual abuse perpetrated by a teacher against a student for acts perpetrated both at school and after the claimant left the school.

On 1 April 2020, the Supreme Court in **Barclays Bank plc v Various Claimants [2020] UKSC 13** allowed an appeal from the Court of Appeal and held that the traditional common law principle that a person will not be liable for the acts of an independent contractor, i.e. one who is carrying on business on his own account, still applies.

Haringey London Borough Council v FZO [2020] EWCA Civ 180

The claimant sought damages for sexual abuse committed by a teacher at Highgate Wood School in London between 1980-1982 and then again in 1983-84 (when the claimant was a pupil at the school). The claimant alleged that the assaults continued after the claimant had left the school, until 1988. Although the abuse ended in 1988, the claimant continued to have contact with the teacher until 2012. The claimant issued proceedings against the teacher directly and against the local authority employing the teacher, which it claimed was vicariously liable for his actions. The claimant was successful in the High Court and recovered £1.1m for

injuries and losses which were held to be a direct result of the abuse. The local authority appealed this decision on the grounds of limitation, consent and, the most interesting from an employment law perspective, vicarious liability, claiming that the trial judge erred in law by holding the school liable for assaults which occurred after the claimant had left the school.

Court of Appeal Finding

In considering the issue of vicarious liability, the judge at first instance applied the two stage test emerging from recent decisions of the UK Supreme Court in **Various Claimants v Catholic Child Welfare Society and others [2012] UKSC 56** and **Mohammed v Wm Morrison Supermarkets plc [2016] UKSC 11**. This test provides that for vicarious liability to arise there must be:

1. a relationship between the parties capable of giving rise to vicarious liability, such as employment, throughout the relevant period; and
2. a sufficient connection between the act or omission of one party and the relationship between the parties.

On appeal, the school claimed that the second limb of the test had not been met in relation to the assaults that occurred after the claimant left the school in 1984. The Court of Appeal however did not agree. The Judge cited **Morrison Supermarkets plc v Various Claimants** in

finding that the fact that the acts in issue were committed away from the workplace or outside the hours of duty, was less relevant today than it had been previously. Taking an expansive approach towards the 'close connection' criteria, the judge held that while each non-consensual sexual act committed may have been a separate tort, each of the incidents of abuse (including those which took place after the claimant left school), was founded upon an abuse of the position of trust which had been created in school. Therefore, there was a sufficiently close connection between the school and the post-school acts, such that the local authority was vicariously liable for both the incidents which occurred at school and after the claimant left the school.

Barclays Bank plc v Various Claimants [2020] UKSC 13

Numerous claimants sought damages for sexual abuse allegedly perpetrated by a doctor, Dr Bates, while he was engaged by Barclays Bank plc ("**Barclays**"). Dr Bates was engaged by the bank to perform medical assessments on its employees and prospective employees. He was not an employee and was paid a fee for each report. While the examinations took place in a consulting room in Dr Bates' home, Barclays arranged the appointments, told the applicants when and where to go and provided Dr Bates with a pro forma report to be filled in.

The claimants claimed that Barclays was vicariously liable for any alleged assaults perpetrated by Dr Bates in the course of medical examinations carried out at the bank's request. In 2017, the High Court

agreed with the claimants and held that Barclays was vicariously liable for the assaults. This was appealed to the Court of Appeal who upheld the High Court's decision and dismissed the appeal. Barclays appealed this decision to the Supreme Court.

Supreme Court Finding

Barclays argued that although recent decisions have expanded the categories of relationship which can give rise to vicarious liability beyond just that of employer and employee, the general common law proposition that no vicarious liability arises for negligence or other torts committed by an independent contractor still stands.

Considering the recent decisions expanding the law on vicarious liability, the Supreme Court noted that the law has developed from a position where only the relationship between employer and employee could give rise to such liability to a broader position, where liability can be imposed where there is a relationship which is akin or analogous to employment. However, it found that despite this expansion, there is nothing in the case law to suggest that the classic distinction between employment relationships (or those akin or analogous to employment) on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. In such situations the question is still whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment. Where a tortfeasor is "*carrying on his own independent business*", no vicarious liability will arise.

Applying this to the facts of the case, the Court found that Dr Bates was in business on his own account as a medical practitioner. He was not an employee of the Barclays nor was his relationship anything close to an employee. As such, Barclays could not be held vicariously liable for his actions.

Comment

The finding of the Court of Appeal in **Haringey** is potentially significant for any organisation with employees in a position of trust, such as schools or those in the social care or healthcare settings. It should be noted (although the facts of the cases were very different) that the expansive approach taken by the Court of Appeal towards the application of the 'close connection' criteria is at odds with the more restrictive approach of the Supreme Court decision in **Morrison's Supermarket**. Our briefing on that decision is available [here](#).

While the decision of the Supreme Court in **Barclays** may be welcomed for placing a practical limitation on what acts a person will be held vicariously liable for, the distinction laid down by the court between someone "*carrying on his own independent business*" and those in a relationship of employment may not always be easy to draw, for example in the case of workers who may be technically self-employed or agency workers. Whether such workers are "*effectively part and parcel of the employer's business*" such as to make it fair, just and reasonable to impose vicarious liability will still involve a consideration of the details of the relationship and the facts of the case.