

Smith v Northamptonshire County Council [2009] UKHL 27

Commentary by Patrick Limb QC and Tom Panton¹

The facts

Mrs Jean Smith was employed by the County Council as a driver and carer. On 1 December 2004 she visited the home of a wheelchair-bound service-user (Mrs Gina Cotter) in order to collect her and take her by bus to a day centre.

It was necessary for Mrs Smith to take Mrs Cotter down a wooden ramp situated outside the patio doors of the house. As she was doing this, the edge of the ramp crumbled beneath her foot, causing her to stumble and sustain injury.

The ramp had originally been put in place by the National Health Service. It had been in situ, exposed to the elements, for about 10 years prior to the accident. The Council did not own the ramp but they had inspected and assessed it from time to time. The ramp had been found not to have been in an obvious state of disrepair.

Mrs Smith argued that the Provision and Use of Work Equipment Regulations 1998 (PUWER) applied to the Council in respect of the ramp, and that the Council were in breach of regulation 5(1) for having failed to ensure that it was maintained in an efficient state and in good repair. At first instance, His Honour Judge Metcalf in the Northampton County Court held that the Claimant was correct.

The Court of Appeal ([2008] ICR 826; [2008] EWCA Civ 181) upheld the Council's subsequent appeal.

The Claimant successfully petitioned the House of Lords for leave to appeal, and her appeal came before an Appellate Committee consisting of Lord Hope of Craighead, Baroness Hale of

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Richmond, Lord Carswell, Lord Mance, and Lord Neuberger of Abbotsbury on 4 February 2009. Judgments were handed down by their Lordships today.

The issues

Throughout the case the key issue was, did PUWER apply to the Council in respect of the ramp? If the Regulations applied, then (although they denied as much at first instance) realistically the Council were always likely to have breached regulation 5(1), requiring them to ensure that work equipment was “maintained in an efficient state, in efficient working order and in good repair”.

It is very well-established that this regulation imposes an absolute obligation, so that proof of failure of the work equipment establishes breach regardless of whether it was possible to anticipate the failure before the event or to explain it afterwards, and even if all reasonable steps have been taken (Stark v The Post Office [2000] ICR 1013, applying Galashiels Gas Co v Millar [1949] AC 275).

Regulation 3(2) of the Regulations provides that:

“The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.”

“Work Equipment” is defined in regulation 2(1), as follows:

“‘work equipment’ means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)”

It might be said that the fundamental question raised by this appeal was that of *how broad* the wording of these provisions was intended to be.

The decision of the Court of Appeal

In retrospect it is hard to escape the conclusion that the Court of Appeal saw this case as a third opportunity (following its previous decisions in Hammond v Commissioner of Police of the Metropolis & others [2004] ICR 1467 and then PRP Architects v Reid [2007] ICR 78) to restrict the ambit of PUWER. On any analysis, the practical effect of their decision was to effectively re-write PUWER so as to read in a test whereby an employer would only be liable if

it had such *control* of the equipment in question as to justify the imposition of strict liability. The Council, it was said, did not have such control in this case because they did not actually own the ramp or maintain it themselves.

It is not hard to see the spur for this judicial reformulation (to adopt a phrase used by Neuberger LJ, as he then was, in Reid). The potential breadth of PUWER on a literal reading of the provisions set out above is self-evidently very, very broad indeed, encompassing items of equipment over which an employer has no control whatsoever. In all of the three Court of Appeal decisions which have restricted the ambit of PUWER, claimants have been successfully painted as arguing for an absurdly wide construction of the Regulations. Mrs Smith was (perhaps unfairly) bracketed in that category, and hence the result. On any analysis, however, her case plainly involved a very old tension in health and safety law – the battle between those arguing for employee protection on one hand, and those arguing for reduced (some would say realistic) burdens on employers on the other.

The issues for the House of Lords

Once the Claimant's petition for leave had succeeded, it was initially agreed that there were four issues on the appeal:

- 1 Was the ramp “work equipment” for the purposes of Regulations 2 and 5 of the 1998 Regulations?
- 2 What is the proper construction of the words “...for use at work...” as found at Regulation 2(1) of those Regulations?
- 3 What is the proper construction of “... for use or used ... at work” as found in Regulation 3(2) of the 1998 Regulations?
- 4 Was the ramp provided for use or used at work by the Appellant for the purposes of Regulation 3(2) of the 1998 Regulations?

Somewhat unusually however, another key decision of the House of Lords interposed itself into the progress of this appeal. This was Spencer-Franks v Kellogg Brown and Root Ltd and another [2008] ICR 863. The decision had two effects. The first was that it (at least on one view) seemed to dispose of issues relating to PUWER regulation 2(1) by clarifying that whether an item is ‘work equipment’ depends upon whether it performs a “*useful practical*

function in the employer's undertaking" (see, in particular, Lord Rodger at paragraph 51 onwards).

The second was that it cast significant doubt upon the Court of Appeal's decision in Hammond, and May LJ's famous suggestion in that case that PUWER were concerned with "*tools of the trade*". Spencer-Franks was actually decided even before Mrs Smith was granted leave to appeal, and the House gave leave based partly on supplementary submissions dealing with that decision.

Prior to the appeal hearing, and ostensibly in view of Spencer-Franks, the Council conceded issues 1 and 2. The remaining issues 3 and 4 (focusing on regulation 3(2) of PUWER), were argued in full.

The decision of the House of Lords

The Claimant's appeal has been dismissed by a majority of 3 to 2. In a rather intriguing echo of their decision in Fytche v Wincanton Logistics plc [2004] ICR 975, the Law Lords have split three to two, with Lord Hope and Baroness Hale again dissenting.

Of the majority it was Lord Neuberger who gave the leading judgment, although his judgment was plainly prepared having had sight of the views of Lord Hope and Lord Mance and his speech is to some extent an exercise in seeking to decide between their respective positions.

Lord Hope was prepared to accept that an employer should have some degree of control in order for the Regulations to apply, despite the absence of that word from regulation 3(2). He indeed held that control was "*the underlying assumption upon which the application provisions throughout this regulation are based*" (paragraph 27). The key point for him, however, was that such control was not to be limited to actual control over the equipment itself – he held that it was quite sufficient that the Council had control over Mrs Smith's use of the ramp. Thus, Lord Hope held that the Council's authorisation and control over (or alternatively, consent and endorsement of) the use of the ramp was sufficient to fix them with liability under the Regulations (paragraph 28 and 31).

For her part, Baroness Hale considered that the main limitation to the scope of the Regulations was that the use of the work equipment must be known about and authorised by the employer, with a further limitation being that the actual use made of the equipment must be for the purposes of the employee's employment (thus an i-pod brought in to listen to while working would not be work equipment) – see paragraph 34. She was plainly not convinced of

the need for any further limiting factors, in particular the concept of control. If control was relevant, however, then she considered that it was enough if the employer “*can tell the person who might use the equipment not to use it or how to use it*” (paragraph 37). She had no difficulty in finding that the Council in this case were very much in control of Mrs Smith and her use of the ramp (paragraph 39).

Lord Carswell stated that his own opinion had “*swung around to a large extent*” since he commenced consideration of the issues on appeal (paragraph 53), and that he had ultimately come down in favour of Lord Mance’s approach. He considered that the ramp did not come within the Council’s undertaking or establishment because they did not supply or repair it themselves (paragraph 54). No further reasoning as such is given by that Law Lord.

Lord Mance took as his starting-point the wording of the European Directive, imposing responsibility for “*work equipment made available to workers in the undertaking and/or establishment*”. He held that there was a need for some specific nexus between the equipment and the employer’s undertaking if the Regulations were to apply (paragraph 63). The necessary nexus was only supplied if the equipment had been “*incorporated into and adopted as part of the employer’s business*” (paragraph 65). Interestingly he does not appear to have regarded this approach as necessarily importing a *control* test, but if control was relevant then in his view it could only be in the sense of control over the work equipment itself (paragraph 66). On the facts of Mrs Smith’s case, he disagreed that any relevant control existed, referring to the Judge’s approach to the concept of control as being “*over generous*” (paragraph 69).

Lord Neuberger’s starting-point was that the Regulations “*are intended to impose absolute liability on an employer in a very wide, but not infinitely wide, range of factual circumstances*” (paragraph 82). He thought that in the final analysis the key difference between the approaches of Lord Hope and Lord Mance related to the nature of the control which the employer had to have (paragraph 82). He had, albeit with “*considerable hesitation*” (paragraph 84), come to the view that he agreed with Lord Mance. In the absence, as he saw it, of any definitive answer within the wording of the Regulations themselves, he identified various particular factors as pointing towards a more limited view of the scope of the Regulations, based upon a test of control of the equipment.

It is worth noting, however, that in what might be said to be a veiled criticism of the Court of Appeal’s approach, Lord Neuberger stated at paragraph 86 that whilst it may be possible to imply a term into the Regulations to the effect that they only applied where compliance was legally possible, he doubted that such a reading would be permissible or appropriate.

Analysis

Lord Neuberger's speech appears last in the law report but it will have to be the first port of call for anyone considering the scope of the 1998 Regulations from this point forward.

Certain key points emerge from the judgments as a whole:

- 1 There is a two-stage test. Is the item "work equipment" (regulation 2(1))? Secondly, do the Regulations apply to the equipment in question (regulation 3(2))?
- 2 The first stage of the test, whilst broad, does contain its own limitations. Nothing that was said in Spencer-Franks has been disturbed and so Lord Rodger's "practical, useful function" test remains intact, but the minority speeches in Smith contain some interesting observations in this regard – see in particular Lord Hope's view that the words "for use at work" exclude "*items that are for storage only or for decoration... or which cannot be 'used' at all such as the floors, walls or ceilings of a building*", but do not limit the Regulations to items within the employer's own premises or provided by him (paragraph 21). See also Baroness Hale's view that the use must "*...be known about and authorised by the employer...*" and "*for the purposes of the employee's employment*" (paragraph 34).
- 3 The second stage of the test (regulation 3(2)) now involves an analysis of the question of control. Control over the use of the equipment is not enough; control over the equipment must be demonstrated. Judging by the result in Mrs Smith's case, such control cannot be demonstrated simply by the fact that an employer has assessed and inspected the piece of equipment in question.

Conclusions

It would seem, therefore, that the over-arching question of the overall breadth of PUWER has been answered quite narrowly by their Lordships, albeit not without considerable difficulty and debate. The scope for that debate is perhaps best illustrated by the speech of Lord Mance. At paragraph 65 of his speech, he stated:

"... I would myself take as the test whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other

undertaking, whether as a result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement"

That some readers might consider this passage and wonder how, on the particular facts of her case, Mrs Smith nonetheless did not meet the above test is perhaps a reflection of the inherent difficulties of statutory interpretation in this area.

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For further information on Ropewalk Chambers generally please contact the Senior Clerk, Tony Hill, on (0115) 983 8000.

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