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Being reasonable

Features

Personal Injury

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So far as is reasonably practicable: are employers about to face a tougher test? ***Brent McDonald*** *reports*

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In Brief

· In *Commission v UK: C-127/05* the ECJ rejected the Commission's case that a strict liability regime should be imposed for breach of the Framework Directive.

· Although SFAIRP clauses remain permitted, the case has produced persuasive precedent that what is reasonably practicable should be a question of technical feasibility only, not one of cost.

· The significance of the Framework Directive's purposes should not be overlooked when applying laws made under EU Directives; it formed an important part of the reasoning of the House of Lords in *Robb v Salamis (M&I) Ltd* and there may be wider implications yet.

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In *Commission v UK: C-127/05* [2007] All ER (D) 126 (Jun) the European Court of Justice (ECJ) rejected an attempt by the Commission to declare the use of "so far as is reasonably practicable" (SFAIRP) clauses in health and safety regulations incompatible with Directive 89/391/EEC, commonly known as the Framework Directive.

The ECJ decided that the Commission had failed to put forward a sufficiently clear and evidence-based argument to justify this step. However, the matter may not end there thanks to Advocate General Mengozzi's opinion to the court. Although the opinion supported the dismissal of the Commission's case, it states that SFAIRP clauses which allow employers a defence based on more than technical infeasibility are contrary to the purpose of the Framework Directive, and hence incompatible.

If that is correct, unless SFAIRP clauses are applied differently by the courts in future, litigants may be forced to rely directly on regulations as against emanations of the state and/or decide to litigate against the UK for a failure to correctly implement EU Directives.

Common Law Position

In domestic law, SFAIRP clauses have long been used in health and safety legislation. In *Edwards v NCB* [1949] 1 KB 704, [1949] 1 ALL ER 743, Lord Justice Asquith defined the clause:

> "Reasonably 'practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and if it be shown that there is a gross disproportion between them--the risk being insignificant in relation to the sacrifice --the Defendant discharges the onus on them. Moreover this computation falls to be made by the owner at a point of time anterior to the accident."

This test has been restated and adopted in recent years in cases such as *Hawkes v London Borough of Southwark* (unreported, 20 February 1998, Court of Appeal).

The Framework Directive

On 12 June 1989 the Framework Directive was adopted by the EU. Its object was "to introduce measures to encourage improvements in the safety and health of workers at work". No mention was made of allowing economic considerations to play a part; rather the preamble said that "the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations".

Although more detailed "daughter" directives were to follow, Art 16(3) expressly stated that the general duties imposed by the Framework Directive would continue to apply. Key among these duties was that imposed by Art 5(1): "The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work."

Art 5(4) allowed for a restriction upon the duty "to ensure" under Art 5(1):

> "This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care."

In the UK, ministers considered that by requiring employers to avoid risks to workers "so far as is reasonably practicable" they had given effect to the Framework Directive. The UK courts continued to apply a traditional approach to SFAIRP clauses despite concerns that in doing so they were wrongly allowing economic interests to influence the outcome contrary to EU law.

Commission v UK

The Commission complained by formal letter to the UK that its implementation of the Framework Directive was inadequate on 29 September 1997. Following its correspondence with the UK and a reasoned opinion in 2003, on 21 March 2005 the Commission referred the matter to the ECJ for a determination of compatibility under Art 226 of the EC Treaty. The Commission contended that nothing short of a strict liability regime was required by the Framework Directive so that employers remained liable to "ensure the safety and health of workers in every aspect related to the work".

The UK submitted that under domestic law an employer could only escape liability under the Heath and Safety at Work etc Act 1974 by showing that it had done everything reasonably practicable to avoid risks to the safety and health of workers. Only if there was a gross disproportion between the risk to the safety and health of workers and the sacrifice--whether in money, time or trouble--would the defence be made out.

Following submissions by the parties, Advocate General Mengozzi's opinion was delivered on 18 January 2007. He rejected the Commission's argument that a strict liability regime was necessary to properly implement the Framework Directive and therefore indicated that the Commission's case should be dismissed. The ECJ agreed with this position in its relatively terse judgment of 14 June 2007.

Advocate General Mengozzi, however, critically considered whether or not the UK was right to allow an employer to bring into account its economic factors when determining whether the duty imposed by the Framework Directive had been breached.

In the advocate general's opinion, the criterion which formed the basis for assessing whether the employer's conduct complied with the duties imposed by the Framework Directive was "whether it is, objectively speaking, technically feasible to eliminate or reduce a risk to the safety and health of workers".

In contrast, the UK's test: "Involves an evaluation which goes beyond establishing whether it is possible to prevent a risk arising or to reduce the extent of that risk on the basis of the technical possibilities available: even in the case of risks which are actually capable of being eliminated, it permits (or, more accurately, requires) a balancing out between the costs--and not only the financial costs--of the preventive measures ... and the seriousness and extent of the harm that could ensue for the workers' health."

The advocate general found that:

> "The concept of what is 'reasonably practicable' is incompatible with the scope that should attach to the general duty to ensure safety laid down in Article 5(1) of the Framework Directive. Even accepting the United Kingdom's point that a cost-benefit analysis of that nature will rarely, in practice, produce a result favourable to the employer, such an analysis does not seem to me to be permissible under the Community system of protecting the safety and health of workers, which appears to give priority to protecting the individual worker rather than financial enterprise."

Persuasive Precedent

While the opinion is not binding, it is highly persuasive. Should the Commission choose to reformulate its arguments to mirror the advocate general's opinion, then one would normally expect the ECJ to accept them.

In the meantime, this is a persuasive precedent to cite in the UK courts in any case where an employer seeks to argue that a cost-benefit analysis or a criterion other than technical feasibility should apply under a SFAIRP clause. As is well known, domestic courts are required to give a purposive interpretation to legislation implementing EU law.

Arguments based on the Framework Directive are assuming more importance. In *Robb v Salamis (M & I) Ltd* [2006] UKHL 56, [2007] 2 All ER 97, the House of Lords cited extensively from the Framework Directive reminding itself that it was bound to interpret statutory duties--in that case the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306)--in accordance with its purpose. This led the Appellate Committee to formulate the duty of employers to anticipate and prevent accidents in terms more favourable to claimants. At para 45 of his speech Lord Clyde even questioned whether Art 5 of the Framework Directive prohibited claimants bearing the burden of proving reasonable foreseeability. Parties (and courts) should remember to consider the duties under the Framework Directive--it may mean that reinterpretation of health and safety legislation is required.