***Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd* [2008] EWCA Civ 393**

**Illegality in employment contracts**

Contracts generally may be void for illegality. In the employment sphere, if the contract is void for illegality then the ‘employee' will not be able to claim for breach of that contract, for example in cases of wrongful dismissal, or for unfair dismissal. The nature of the illegality necessary to render the employee outwith of employment protection was considered by the Court of Appeal.

The appellant employers in these joined proceedings appealed against an EAT decision that the employees had not acted illegally in the performance of their contracts The employees (P and G) had worked on a self employed basis and were treated as such by the Inland Revenue. They later claimed unfair dismissal, arguing that they were really employees, rather than self-employed.

The EAT found that they were employees but had believed in good faith that they were self-employed and had not made misrepresentation to the Inland Revenue, and were entitled to claim unfair dismissal. The employers claimed that as the employees had participated in an illegal performance of the contract, they were not entitled to protection.

The Court of Appeal dismissed the appeal. The employees were entitled to claim unfair dismissal. The employees had committed ‘insufficient' illegality. A contract of employment may be unlawfully performed if there are misrepresentations as to facts. However, that is distinguishable from an error of categorisation which is unaccompanied by false representations, as had occurred in this case.

***O'Hanlon v HM Revenue & Customs* [2007] EWCA Civ 283**

**Disability-related discrimination – reduction in pay because of sickness absence**

The claimant was clinically depressed, making him ‘disabled' for the purposes of the Disability Discrimination Act 1995. The employer's sick pay rules provided that anyone absent through sickness would receive full pay for 26 weeks in any four-year period, and thereafter half pay for the next 26 weeks, and thereafter the pension rate. The claimant had lengthy absences related to her disability.  She claimed that she should be given full pay during her absence as that failure to do this amounted to disability-related discrimination.

The EAT stated that it would be rare for a duty to make reasonable adjustments to entail a requirement that a disabled absent employee be paid more than a non-disabled absent employee. It held that the reduction was disability-related discrimination but that it was justified, as the suggested adjustment of increasing sick pay was not an adjustment that a reasonable employer would be required to make.

The Court of Appeal rejected the appeal, agreeing with the reasoning of the EAT.

***Blundell v Governing Body of St Andrew's Catholic Primary School* [2007] IRLR 652**

**Maternity leave – right to return to work – ‘same job'**

The claimant teacher had taught a reception class before taking maternity leave. Upon her return, she was offered a role either as a floating teacher or taking a class of older children. The claimant took the role of teaching older children, but considered it to be a particularly onerous duty, as she had not previously taught that age-group, who were subject to national assessment tests. The claimant argued that the employer had committed acts of less favourable treatment towards her due to her pregnancy, and that the employer had failed to return her to the same job.

The tribunal dismissed the claim, finding no detriment, as the claimant was contractually required to teach whatever class she was allocated. The job in which she had previously been employed was that of teacher, not of reception class teacher.

The EAT held that the right to return to ‘the job in which she was employed before her absence' provided by Reg 18 of the Maternity and Parental Leave etc Regulations1999 meant that the employee should be able to return to a work situation as near as possible to that which she left. In this case the return post was within the normal range of variability which the claimant could reasonably have expected.

***Pay v Lancashire Probation Service* [2004] ICR 187; *Pay v UK* [2009] IRLR 139**

**Unfair dismissal – reason for dismissal – some other substantial reason – sexual behaviour outside work - respect for private life (Article 8 ECHR)**

The claimant was involved in the sale of products connected with BDSM and performing in fetish clubs. Photographs were available on the internet of him involved in these activities. The claimant was a probation officer working with sex offenders. The employer dismissed him on the basis that his activities were inconsistent with the role of probation officer. The claimant claimed unfair dismissal, relying on his Article 8 ECHR right to respect for private life.

The EAT held that section 98 of the Employment Rights Act 1996 should be interpreted as including ‘having regard to the applicant's Convention rights' but that Article 8 was not engaged because the activities were in the public domain, as photographs were available on the internet and the activities took place in fetish clubs. The claimant's activities were therefore not ‘private'.

The case was heard before the European Court of Human Rights as *Pay v UK*. The ECtHR adopted a different approach, finding that conduct occurring outside a purely private place could still fall within the protection of Article 8 as ‘private life'. The court was content to continue on the basis that the claimant's Article 8 right was engaged. However, it found that any interference with his right was justified.

## COMPETENT STAFF

**Smith v Crossley Bros (1951) Current Law Year Book (1947-51) 6831**

The plaintiff, an apprentice employed in the defendants' apprentice training school, was seriously injured by a practical joke played upon him by two fellow-apprentices. The Court of Appeal held the defendants not liable to the plaintiff in negligence, because his injury had occurred through an act of wilful misbehaviour which the defendants could not reasonably have foreseen.

**Waters v MPC (2000) 27 July 2000**

From the speech of Lord Slynn:

The plaintiff was a police officer. She alleged that on 15 February 1988 in her police residential accommodation at Marylebone she was raped and buggered by a fellow officer at a time when they were both off duty. On 3 March 1988 she complained to her reporting Sergeant and thereafter she complained to other officers about what had happened. A writ was issued on 4 February 1994 against the MPC and a statement of claim served on 20 June 1994. She alleged that the MPC was to be treated as her employer and that in breach of his duty to her as such, in breach of contract and of statutory duty and negligently he failed to deal properly with her complaint but "caused and/or permitted officers to maliciously criticise, harass, victimise, threaten, and assault and otherwise oppress her" as set out in the statement of claim. Alternatively she alleged that the respondent was liable vicariously for the acts of officers under his command in the Metropolitan Police.

The principal claim raised in the action was one of negligence-the "employer" failed to exercise due care to look after his "employee". Generically many of the acts alleged can be seen as a form of bullying-the "employer" or those to whom he delegated the responsibilities for running his organisation should have taken steps to stop it, to protect the "employee" from it. They failed to do so. They made unfair reports and they tried to force her to leave the police.

If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. He may also be in breach of that duty if he can foresee that such acts may happen and if they do, that physical or mental harm may be caused to an individual. Lord Slynn accepted (Evans LJ in the Court of Appeal was prepared to assume without deciding) that if this sort of sexual assault is alleged (whether it happened or not) and the officer persists in making complaints about it, it is arguable that it can be foreseen that some retaliatory steps may be taken against the woman and that she may suffer harm as a result. Even if this is not necessarily foreseeable at the beginning it may become foreseeable or indeed obvious to those in charge at various levels who are carrying out the Commissioner's responsibilities that there is a risk of harm and that some protective steps should be taken.

The Courts have recognised the need for an employer to take care of his employees quite apart from statutory requirements (Spring v. Guardian Assurance plc [1994] I.C.R. 596 at 628E. As to ill treatment or bullying see Wigan Borough Council v. Davies [1979] I.C.R. 411 at p. 419 (a claim in contract); Wetherall (Bond Street W1) Ltd v. Lynn [1978] 1 W.L.R. 200 (a constructive dismissal case); Veness v. Dyson Bell & Co [The Times, 25 May 1965] where Widgery J refused to strike out a claim that "[the plaintiff] was so bullied and belittled by her colleagues that she came to the verge of a nervous breakdown and had to resign".

The main claim against the MPC for breach of personal duty (although the acts were done by those engaged in performing his duty) should not be struck out.

**Veness v Dyson, Bell & Co [1965] Current Law Year Book 2691**

The plaintiff claimed damages against her former employers, alleging that persecution and bullying by fellow-employees had brought her to the verge of a nervous breakdown; she contended that the defendants should have provided reasonable conditions whereby she could fulfil her duties, should have taken reasonable steps to protect her from undue interference by her colleagues, and had failed to exercise due care and skill in maintaining proper discipline. It was held by Widgery J (1) that these allegations should not be struck out; but (2) that a further allegation that one of the defendants' partners had been rude to her was, as a cause of action, misconceived, and should be struck out.

**Wetherall (Bond St) v Lynn [1978] Current Law Year Book 901**

In deciding whether or not an employee has been constructively dismissed within the meaning of para. 5(2)(c) of Sched. 1 to the Trade Union and Labour Relations Act 1974, and whether he had repudiated the contract of employment by showing an intention not to be bound by its terms.

After working for W as an assistant area manager for one year, L was transferred to head office to be retail stock controller. Three months later, following a dispute over a holiday and criticisms of his work by a director of the company, L received an official warning letter from that director accusing him of negligence and inefficiency. He was absent from work for 17 weeks suffering from a nervous breakdown, during which period he made repeated requests for an interview with the director concerned, all of which were refused. He then resigned from the company, and complained to an industrial tribunal that he had been constructively dismissed by W and that the dismissal was unfair. The tribunal held that W had acted unreasonably, and that L was entitled to terminate his contract within the meaning of para.5(2)(c). W appealed.

It was held by the Employment Appeal Tribunal, dismissing the appeal, that in the circumstances it was clear that W had repudiated the contract and that he had been constructively dismissed; since W had acted unreasonably within the meaning of para.6(8), the dismissal was unfair.

**Wigan Borough Council v Davies [1979] Current Law Year Book 840**

An employer has an obligation to provide reasonable support to ensure that an employee can work without undue harassment from fellow employees; the burden of proving that such support was given rests upon the employer.

The employee was unpopular with fellow employees at an old people's home since she failed to support their industrial action against the warden. The employers tried unsuccessfully to find her employment elsewhere and she agreed to remain at the home after her employers' assurance that they would give all reasonable support so as to enable her to work without disruption. Nothing was apparently done to remove the fellow-employees' continued hostility towards the employee who in due course left. An industrial tribunal found that she had been unfairly dismissed.

It was held by the Employment Appeal Tribunal, dismissing the employers' appeal, the burden had been upon the employers to establish that they had taken all reasonable steps; and that the tribunal had been entitled to conclude upon the evidence that the burden of proof had not been discharged.

### SAFE PLACE OF WORK

**Cook v Square D Ltd [1992] ICR 262**

The plaintiff, an electronics engineer, worked for a company based in the UK. He was sent on an assignment to complete the commissioning of a computer control system in Saudi Arabia. His work there was carried out in a control room housing the computers. The area had a specially constructed floor, each tile being removable so that access could be obtained to the wires and cables beneath. The employee, having almost completed his work on the system, was instructing others on the use of the system, when he slipped as a result of a raised tile that had been left unguarded and injured his knee.

It was held by the Court of Appeal that the employers had a duty, that could not be delegated, to take all reasonable care to ensure the safety of the employee whilst he was working overseas; that to hold the employers responsible for the daily events on a site in Saudi Arabia, owned and managed by reliable companies, lacked reality and that the circumstances clearly established that the employers had not delegated their responsibility and that the accident to the employee had not been caused by any breach of duty on their part.

Per Farquharson LJ. It may be that in some cases where, for example, a number of employees are going to work on a foreign site or where one or two employees are called on to work there for a considerable period of time that an employer may be required to inspect the site and satisfy himself that the occupiers were conscious of their obligations concerning the safety of people working there.

**Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004)**

Maintenance of workplace, and of equipment, devices and systems

5 (1) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.

(2) Where appropriate, the equipment, devices and systems to which this regulation applies shall be subject to a suitable system of maintenance.

(3) The equipment, devices and systems to which this regulation applies are-  
(a) equipment and devices a fault in which is liable to result in a failure to comply with any of these Regulations; and  
(b) mechanical ventilation systems provided pursuant to regulation 6 (whether or not they include equipment or devices within sub-paragraph (a) of this paragraph).

### ADEQUATE PLANT AND EQUIPMENT

**Toronto Power Co v Paskwan [1915] AC 734**

The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

The plaintiff's husband, while in the employment of the defendants, was killed by the falling of a block from a travelling crane used in their power-house. The block fell owing to the overwinding of a drum which hoisted a chain to which the block was attached. The jury found, inter alia, that the accident was due to the negligence of the defendants, through their master mechanic, in failing to install proper safety appliances and to employ a competent signalman. The judge entered judgment for $6000, which was affirmed by the Supreme Court of Ontario. The defendants appealed. The Privy Council dismissed the appeal.

**Parkinson v Lyle Shipping Co [1964] 2 Lloyd's Rep 79**

Personal injuries were sustained by the plaintiff donkeyman greaser when "blow-back" occurred while he was lighting a Scotch boiler in the defendants' motor vessel Cape Rodney. A claim was made by the plaintiff, alleging that the defendants failed to maintain the boiler in working condition. It was contended by the defendants that the plaintiff failed to adopt the correct procedure for lighting the boiler. The opinion given by the plaintiff's expert witness was that if the plaintiff did what he said, the air check controls were faulty. Evidence was given by the ship's officers that, after the accident, the air check controls were working properly.

It was held in the QBD that the plaintiff was himself negligent in standing in front of the furnace when lighting it; that the air check controls were not faulty; that, although there must have been oil in the furnace, if the plaintiff had opened the air check controls vapour would have been removed; that the plaintiff did not open the air check controls; and that, therefore, the plaintiff's claim failed.

**Leach v British Oxygen Co (1965) Current Law Year Book 2725**

The plaintiff, an employee of the defendants who was experienced in the task of breaking up calcium chloride, used the wrong tool for the job; as a result an explosion occurred and the plaintiff was injured. The plaintiff contended that the defendants were negligent in not warning or reminding him to use the correct tool. It was held by the Court of Appeal that the plaintiff's conduct was not a "momentary aberration" but an act of folly, against which the defendants were not bound to guard him, so that they had not been negligent.

### SAFE SYSTEM OF WORKING

**Petch v Customs and Excise Commissioners [1993] ICR 789**

The plaintiff, who joined the Civil Service in 1961 as a clerical officer, was highly regarded by his superior officers and by 1973 had risen to the rank of assistant secretary. In 1974, while working in the defendants' department, he had a mental breakdown. In 1975, after his return to work, he was transferred as assistant secretary to the DHSS. In 1983 he fell ill again but was able to return to work until 1986, when he was retired from the Civil Service on medical grounds. In an action by the plaintiff for, inter alia, damages against the defendants for negligence, the judge held that, although the plaintiff would not have suffered the breakdown in 1974 if he had not been subjected to heavy pressure at work, the defendants were not negligent in failing to take steps which would have prevented the plaintiff's illness.

It was held by the Court of Appeal, inter alia, that as it had not been shown on the evidence that the defendants' senior management were aware, or ought to have been aware, in 1974 that the plaintiff was showing signs of impending breakdown or that his workload carried a real risk of breakdown and had not acted negligently following his return to work, the defendants had not been in breach of their admitted duty to take reasonable care to ensure that the duties allocated to the plaintiff did not damage his health.

**Baker v T. Clarke Ltd [1992] Current Law Year Book 2019**

The plaintiff, a very experienced electrician, was employed by the defendant and was injured when he fell from a mobile scaffold tower which toppled over, the plaintiff having failed to use the available outriggers or lock its wheels. It was held by the Court of Appeal, that it was not necessary for an employer to tell an experienced, skilled worker about matters of which he was well aware, or of precautions to be adopted, unless there was a reason to believe that he was failing to adopt the proper precautions, or the dangers were insidious. As the plaintiff understood quite well how to make the platform safe, the defendant was not obliged to give constant or repetitive reminders.

**Rozario v The Post Office [1997] Current Law Year Book 2623**

Rozario was injured at work when lifting a box weighing 10.26kg to a height of one metre, and twisting slightly. Rozario had worked for the Post Office for 15 years. He had asked earlier to be moved to light work on account of back trouble, but later asked to be moved back to his prior work and was on that work at the time of the accident. The system of work did not give rise to foreseeable injury.

It was held by the Court of Appeal that it was not necessary that the employers should have supervised Rozario closely, because he was experienced and the job was a simple task. The employer's obligation was to take reasonable care to provide a safe system of work and to see that it was followed. In these circumstances, there was no foreseeable risk and the employers were not under a duty to oversee the employee's method of lifting the box.

### DEFENCES

**VOLENTI NON FIT INJURIA**

**Smith v Baker [1891] AC 325**

When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control - the danger being created or enhanced by the negligence of the employer - the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim "Volenti non fit injuria" applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law. And this so both at common law and in cases arising under the Employers Liability Act 1880.

The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen from the crane and injured the plaintiff, he sued his employers in the County Court under the Employers Liability Act 1880.

It was held by the House of Lords, reversing the decision of the Court of Appeal (Lord Bramwell dissenting), that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that the maxim "Volenti non fit injuria" did not apply; and that the action was maintainable.

**Baker v James Bros [1921] 2 KB 674**

The plaintiff, a commercial traveller, was employed by the defendants, who were wholesale grocers. His duties were to travel round the district, show samples, take orders and deliver goods, and for that purpose he was supplied by the defendants with a motor-car, the starting gear of which was defective. He complained of this on several occasions to the defendants, who admitted that it was defective, but failed to remedy the defect. While the plaintiff was upon one of his journeys the car stopped, and in trying to restart it, he was severely injured.

In an action brought by the plaintiff to recover damages in respect of personal injury resulting from the negligence of the defendants, it was held at Northampton Assizes, that the plaintiff, notwithstanding his knowledge of the defect in the starting gear, had never undertaken or consented to take upon himself the risks arising from continuing to use the car, that he had sustained the injury owing to the personal negligence of the defendants, and that, not having been guilty of contributory negligence, he was entitled to recover.

**Wheeler v New Merton Board Mills [1933] 2 KB 669**

The defendants installed in their factory as part of the plant with the intention that it should be used by their employees a dangerous machine which was not fenced or guarded as required by the Factory and Workshop Act 1901. Owing to the condition of the machine the plaintiff, a workman in the employment of the defendants, was injured by it in the course of his work. It was found that it was not by the negligence of the defendants but of their foreman that the machine had been allowed to be used in the condition in which it was at the time of the accident.

It was held by the trial judge, following Baddeley v Granville (Earl) (1887) 19 QBD 423, that the defence of volenti non fit injuria had no validity against an action based on breach of statutory duty; and further that the plaintiff's injury was caused by the "wilful act" of the defendants within the meaning of s29(1) of the Workmen's Compensation Act 1925, and the defendants were therefore not protected by that section from liability to the plaintiff independent of the Act. The defendants appealed, and contended that the maxim "volenti non fit injuria" was a defence to the action, and that Baddeley v Granville (Earl) was wrongly decided.

It was held by the Court of Appeal, dismissing the appeal, that the defence of volenti non fit injuria was no answer to a claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed upon him by statute. Baddeley v Granvill (Earl), which had so decided in 1887, had been the law for nearly fifty years, and it was now too late for that Court to interfere with the decision.

Per Slesser LJ: The principles laid down in Baddeley v Granvill (Earl) had been approved by the Court of Appeal in Groves v Wimborne (Lord) [1898] 2 QB 402. (See Cases on Breach of Statutory Duty)

### CONTRIBUTORY NEGLIGENCE

**Flower v Ebbw Vale Steel Iron & Coal Ltd [1936] AC 206, 214**

The plaintiff brought an action for personal injury alleged to have been sustained by a workman through his employers' breach of their statutory duty under s10 of the Factory and Workshop Act 1901, in not securely fencing a machine for rolling metal sheets in their factory. The workman in the course of his duty was cleaning the machine. To enable this to be done the rollers are set in motion. The safe and simple way to clean them is to take one's stand at the back of the machine and apply emery-cloth or engineers' waste over the iron bar to the upper part of the rollers; for then all the seven rollers are revolving away from the operator. There was some evidence that he had been told to use this method, but it was of a vague and general kind. The employers pleaded that the alleged injury was caused solely by the workman's own negligence in attempting to clean the machine at a wrong part, and omitting to take reasonable care to prevent his left hand from coming into contact with the rollers.

The judge held that the machine was dangerous and that it was not sufficiently fenced; but that the workman had acted in disobedience to his orders without any good reason for so acting, and that his disobedience was the proximate cause of the accident. The judge also held that the defence of contributory negligence was open to the employers. Accordingly he gave judgment for the employers. The workman appealed to the Court of Appeal, which affirmed the judgment of the trial judge.

The House of Lords held that judgment be entered for the employee. The decision of the Court of Appeal was reversed on the ground that the only contributory negligence relied on was disobedience to orders, and that the evidence at the trial was insufficient to prove that the alleged orders were ever given. Consideration was given by Lord Wright (at p214-5) of the circumstances in which contributory negligence may be pleaded as a defence to an action by a workman for personal injuries through a breach by his employers of their duty under s10(1)(c) of the Factory and Workshop Act 1901, to fence securely all dangerous parts of the machinery in their factory.