Neutral Citation Number: [2020] EWHC 2613 (QB)

Case No: D28YM173/BM90198A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ON APPEAL FROM HHJ RAWLINGS SITTING
IN THE STOKE-ON-TRENT COUNTY COURT
Claim number: D28YM173

Date: 05/10/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

ANDREW CHELL	**Claimant/ Appellant**
- and -	
TARMAC CEMENT AND LIME LIMITED	**Defendant/ Respondent**

- -
- -

Mr Philip De Berry (instructed by **Imperium Law**) for the **Claimant**
Mr Andrew Lyons (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Defendant**

Hearing date: 29 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE MARTIN SPENCER

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 5 October 2020.

MR JUSTICE MARTIN SPENCER :

1. The practical joke must be the lowest form of humour. It is seldom funny, it is often a form of bullying and it has the capacity, as in the present case, to go seriously wrong. Mark Twain was surely right when he said:

> "When grown-up persons indulge in practical jokes, the fact gauges them. They have lived narrow, obscure, and ignorant lives, and at full manhood they still retain and cherish a job-lot of left-over standards and ideals that would have been discarded with their boyhood if they had then moved out into the world and a broader life."

The background facts

2. The Claimant, whose date of birth is 30 May 1980, was employed by a company, Roltech Engineering Limited ("Roltech"), as a site fitter, and from December 2013 his services (and those of his brother, Gavin Chell) were contracted out to the Defendant, Tarmac Cement and Lime Limited, whereby they were working at a site at Brayston Hill, controlled and operated by the Defendant ("Tarmac"). In addition, the Defendant employed its own fitters to work alongside those supplied by Roltech.

3. Two of the fitters employed by Tarmac, Anthony Heath and Jason Starr, having been previously suspended for unrelated reasons, returned to the site and, according to the Claimant, tensions then arose between the Tarmac fitters and the Roltech fitters. The Tarmac fitters thought, probably wrongly, that their jobs were in jeopardy and that they would be replaced by the Roltech fitters. The Claimant said in the court below that he raised the issue of these rising tensions with his supervisor, Mr David Gane, in about mid-August 2014 and that he and his brother then had a meeting with Mr Gane and Mr Geoff Grimley of Tarmac about it. The Claimant said that he asked to be taken off the site but was asked to stick it out for a few more weeks – however, this part of his evidence was not accepted by the learned judge (see paragraph 15 below).

4. The incident which is the subject matter of this claim occurred at about 11.30am on 4 September 2014. The Claimant was working in the workshop on the site when he bent down to pick up a length of cut steel. Mr Heath, one of the two Tarmac fitters, had brought two "pellet targets" with him on to the site and he put those on a bench close to the Claimant's right ear. Mr Heath then hit them with a hammer causing a loud explosion. This appears to have been some form of (wholly misguided) practical joke. The result was no joking matter: the Claimant suffered a perforated right eardrum, noise-induced hearing loss measured at 9-10 decibels and tinnitus. Mr Heath was dismissed from his employment.

5. In consequence, the Claimant has brought these proceedings alleging negligence directly against Tarmac and also against Tarmac as being vicariously liable for the actions of Mr Heath.

The proceedings in the court below

6. In a witness statement by Karen Ward of Tarmac dated 1 March 2017, it was stated that the claim was originally submitted by the online EL Claims portal governed by the pre-action protocol for low value personal injury claims and liability was denied at stage 1.

The Claimant's solicitors proceeded to make an application for pre-action disclosure which came before District Judge Davies at Nuneaton County Court on 4 January 2017 when the District Judge ordered the Defendant to undertake a further search for documents contained within an agreed schedule. Miss Ward's statement was in response to that Order, indicating the existence or non-existence of the various classes of documents contained within the schedule. One of the categories sought was:

> "Any memo or document recording concerns amongst staff about the relations of co-workers Andrew Chell and Anthony Heath and Jason Starr and/or between [Tarmac] and [Roltech] and/or concerns regarding the potential changes in recruitment, threats of redundancy/dismissal, changes in the working practises and/or ill-discipline in the three months prior to the index accident."

Miss Ward said:

> "I can confirm that I have not traced any other documents in relation to the above classification of documents, other than any documents previously disclosed."

7. The Claim Form was issued on 10 August 2017, followed by Particulars of Claim on 10 November 2017. It was contended that, knowing as they did the Claimant's concerns, Tarmac should have considered removing Anthony Heath from the site or separating the employees of Tarmac or Roltech, or should have removed the Claimant from the site or should have disciplined Anthony Heath and others. There were allegations of failure to provide appropriate supervision or to provide training, instruction and memoranda to prevent horseplay. By reference to the disclosure of documentation, it was contended that none of the documents demonstrated adequate policies in place in respect of discipline and supervision or that management took any steps to deal with the tensions between co-workers.

8. On 12 January 2018, Tarmac served its defence denying liability. In particular it denied that the actions of Anthony Heath were within the course of his employment, "horseplay" not being part of an individual's employment. Thus Tarmac denied any liability for Mr Heath's actions which they said were wholly outside the scope of any reasonable foreseeability, risk assessment, HSE guidelines or his employment but were actions of his own volition without any sufficient connection to his employment to make Tarmac liable. Tarmac denied any knowledge of any disciplinary action against Mr Heath previous to the index incident or threatening anyone on site. They further pleaded:

> "8. The first defendant has no knowledge of any tensions escalating on site or of any reports of any concerns about any tensions. The first defendant has no knowledge of any prior events putting the first defendant on notice that any action or intervention was required."

9. Although the Claimant's employer, Roltech, was originally also a Defendant to the action, on 17 December 2018 the Claimant served Notice of Discontinuance against Roltech and the matter came before Judge Rawlings for trial on 14 October 2019.

10. At the trial, the Claimant relied on three witnesses: the Claimant himself who gave evidence as to the tensions which he said were building between the Tarmac fitters and the Roltech fitters and as to the incident itself and the injuries and losses suffered; his brother, Gavin, who confirmed the tensions on site between Tarmac and Roltech fitters and the fact that those tensions were indeed brought to Tarmac's attention; and Mr Gane, the Claimant's supervisor within Roltech, who gave evidence as to his awareness and Tarmac's awareness of the tensions between the fitters.

11. Tarmac did not call any evidence. It is relevant though that, prior to trial, Tarmac had served, late, two witness statements, from Miss Fiona King, Tarmac's HR manager since 2016, and Mr John Jones who was employed by Tarmac as a Maintenance Supervisor at the relevant time. After service of these statements, the Claimant's solicitors indicated that they objected to those witnesses giving evidence and refused to allow the statements to be inserted in the trial bundle and the Defendant served a separate bundle containing those witness statements. At court, the Defendant's counsel, Mr Lyons, decided not to pursue the application to call Miss King or Mr Jones. At that stage, Mr De Berry for the Claimant indicated that he wanted the judge to see the statements because, in his view, they contained information which would assist the Claimant's case. In particular, Miss King had said in her statement:

> "Had a complaint or a concern been raised it would have been investigated and both Roltech and Tarmac supervisors would have been spoken to. If even a vague concern or complaint was raised, HR would have sought further details and fully investigated the matter. Any investigation documents would be kept in hard copy and would be on the file of those involved.
>
> 9. If there was an issue on site, Tarmac would have acted and would not let the issue escalate further.
>
> 10. Had a complaint or concern been raised regarding rising tensions at Brayston Hill, a thorough investigation would have taken place and Tarmac's bullying and harassment policy would have been followed."

The Claimant took the view that, on the basis of the evidence that concerns had been raised by the Claimant and his brother with Mr Gane and in turn with Mr Grimley of Tarmac, the absence of any investigatory documents and the absence of any evidence that an investigation had taken place significantly assisted the Claimant. Thus, although Miss King was not employed by Tarmac at the relevant time, her evidence as to what "would" have happened assisted the Claimant in persuading the court what "should" have happened, but did not.

12. So far as Mr Jones was concerned, he stated in his witness statement:

> "8. I was not aware of any particular bad feeling between the claimant and Tarmac employee Mr Heath, prior to the incident.
>
> 9. I was aware that in general there was some concern and bad feeling from Tarmac employees regarding Roltech staff on site.

> I was unsure as to why the Tarmac employees were concerned as the Roltech employees were never a threat to them and their jobs were not at risk. The Roltech contractors were there to fill a temporary gap and also for major contract works.
>
> 10. The Roltech employees on site were very good at the job and ensured that they came on site, did the job and left again. They often did the job quicker than some Tarmac employees, including Mr Heath and his working partner at the time Mr Starr.
>
> 11. I am unaware of any significant or serious tensions on site between Roltech employees and Tarmac employees and nothing was reported to me by any Roltech supervisor or any employee. Had there been any serious or significant tensions and/or if any complaints had been made, Tarmac would have investigated this."

Mr Jones' statement was significant for the Claimant in that it indicated knowledge on the part of Tarmac of "some concern and bad feeling from Tarmac employees regarding Roltech staff on site" and also the fact that, possibly contrary to the understanding or belief of the Tarmac fitters, their jobs were not actually at risk. This led the Claimant to submit to the court below that, had this been imparted to the Tarmac fitters, and Mr Heath and Mr Starr in particular, that would have defused the tension and the incident of 4 September 2014 would probably never have happened.

The findings and judgment of HHJ Rawlings of 14 October 2019

13. The learned judge identified seven issues arising for decision:

a) The circumstances of the index incident, so far as not agreed;

b) What information Tarmac had before the index incident concerning friction between Tarmac and Roltech fitters at the site and more particularly the activities of Mr Heath;

c) Whether Tarmac is vicariously liable for the actions of Mr Heath in the index incident;

d) The nature of the duty of care owed by Tarmac to the Claimant;

e) Whether Tarmac breached its duty of care to the Claimant;

f) Whether any breach of duty by Tarmac amounted to a substantial cause of the Claimant's injury;

g) Quantification of the Claimant's claim for general and special damages.

Issues a) and b) were questions of fact for the learned judge to decide on the evidence he heard. Issues c), d) and e) were issues of mixed fact and law. Issues f) and g) only arose if there was a finding of breach of duty by Tarmac.

14. In relation to issue a) it was agreed in the court below that Mr Heath had struck the two pellet targets with a hammer close to the Claimant's ear, that he had brought the pellet targets to site from outside but that the hammer used to strike the pellet targets was work equipment provided in the workshop. The learned judge also made the following additional findings:

- Immediately before the index incident, the Claimant and Mr Heath were not working in the same part of the premises and neither Mr Heath or Mr Starr had any supervisory or other role in relation to the work that the Claimant was carrying out in the workshop at the index time;

- Mr Heath and Mr Starr had access to the workshop as part of their role as fitters;

- Mr Heath's actions amounted to a joke at the Claimant's expense, which was connected with the tensions between the Tarmac and Roltech fitters in the sense that those tensions gave rise to a desire on the part of Mr Heath and Mr Starr (who the Claimant said watched Mr Heath doing what he did and laughed about it afterwards) to play a practical joke on the Claimant;

- From the perspective of the Claimant and his brother, the bad feelings of the Tarmac fitters directed at the Roltech fitters had in fact eased in the period shortly before the index accident occurred.

15. The second issue considered by the learned judge related to the information Tarmac had before the index incident concerning friction between the Tarmac and Roltech fitters. He was satisfied that the Claimant and his brother did tell Mr Gane, their supervisor, about the tensions on site between the Roltech fitters and Tarmac fitters, this being the evidence of the Claimant, his brother, Mr Gane and also, to some extent, Mr Jones who had said in his statement that he was aware of general tensions on the site between the fitters. The learned judge said that he was satisfied that the tensions related to a fear on the part of the Tarmac fitters, or at least some of them, that they might be replaced by Roltech fitters who were making the Tarmac fitters look bad by appearing to work harder and to be doing a better job than them. However the friction between the fitters did not include any express or implied threats of violence. Finally the issue of the tension between the fitters was raised once only with Mr Grimley, the manager employed by Tarmac. The learned judge was not satisfied that the Claimant or his brother asked to be taken off site. He said:

> "26. … Mr Gane was clear that they had not told him that they wanted to be taken off the site. I prefer Mr Gane's evidence to that of Mr Chell and Gavin on this issue. Mr Gane struck me as an impressive and honest witness, he was very clear that neither Mr Chell nor Gavin had asked to be taken off the site."

16. The learned judge found that, when they reported friction with the Tarmac employees, the Claimant and his brother did not refer specifically to Mr Heath. Although Mr Heath

had previously been suspended, this had been for misrepresenting the amount of time he had spent at work by cheating Tarmac's clocking-in and clocking-out system. He did not find that Mr Heath was disciplined by Tarmac for threatening anyone on site prior to the index incident. Finally, the learned judge said this:

> "29. Mr De Berry suggested that because Tarmac's disclosure on matters relating to disciplinary action against Mr Heath and its disclosure generally had been woeful, I should make adverse inferences against Tarmac in relation to Mr Heath's disciplinary record. But I declined to infer, based on any deficiencies in Tarmac's disclosure, that Mr Heath had been disciplined for threatening someone on site, based on a perceived failure of it to provide full disclosure of Mr Heath's disciplinary record."

17. At paragraphs 30-63 of his judgment, the learned judge considered the issue of vicarious liability and this is at the heart of the judgment. Having considered the leading cases including *Cox v MoJ* [2016] UKSC 10 and *Mohamud v William Morris Supermarkets PLC* [2016] UKSC 11 and *Lister v Hesley Hall Limited* [2001] UKHL 22, *Wilson v Exel UK Limited* [2010] SLT 671, *Weddall v Barchester Health Limited* [2012] EWCA Civ 25 and *Graham v Commercial Bodyworks Limited* [2015] EWCA Civ 47. The learned judge said this:

> "52. Having gone through those cases and the principles that they suggest should be applied, I draw the following principles from them:
>
> a) The first limb of the *Lister* two-limb test being a close relationship between Tarmac and Mr Heath is satisfied, because Mr Heath was Tarmac's employee at the relevant time;
>
> b) The second limb of the *Lister* test remains undisturbed by the Supreme Court decision in *Mohamud*. The test is whether there is a sufficient connection between the relationship between Tarmac and Mr Heath as employer/employee and Mr Heath's act of striking two pellet targets with a hammer close to Mr Chell's ear to make it just that Tarmac should be held responsible for that act;
>
> c) In considering that question I should consider first the field of activities entrusted to Mr Heath by Tarmac and secondly whether there is sufficient connection between that field of activities and the position in which Mr Heath was employed; and Mr Heath's act of striking the two targets with a hammer close to Mr Chell's ear, to hold that Tarmac should be liable having regard to the principles of social justice; and
>
> d) In considering whether there is a sufficient connection between the wrongful act and the employer/employee, I should consider the five factors identified by Lord Justice Longmore in *Graham*, but other factors may also be taken into account."

Having referred again to his findings of fact, and the submissions of counsel for the parties, the learned judge expressed his conclusions on the issue of vicarious liability as follows:

> "59. Having considered those matters, the following factors do not support a finding that Mr Heath's actions in hitting the two pellet targets with a hammer were within the field of activities assigned to him by Tarmac:
>
> a) The pellet target was brought on to the site, either by Mr Heath or one of his colleagues – it was not work equipment;
>
> b) It formed no part of Mr Heath's work to use let alone hit pellet targets with a hammer at work;
>
> c) What Mr Heath did was unconnected to any instruction given to him in connection with his work;
>
> d) Mr Heath had no supervisory role in relation to Mr Chell's work and at the index time he was meant to be working on another job in another part of the site;
>
> e) The striking of the pellet targets with a hammer did not in any way advance the purposes of Tarmac; and
>
> f) In all those circumstances, work merely provided an opportunity to carry out the prank that he played, rather than the prank in any sense being in the field of activities that Tarmac had assigned to Mr Heath. …
>
> 62. Friction or confrontation is not inherent in Tarmac's enterprise but Mr De Berry argues that, by bringing on to the site Roltech fitters to replace Tarmac fitters, Tarmac created friction or confrontation at the site. I accept that, in accordance to the guidance given by Lord Justice Longmore in *Graham,* that is a factor that can be taken into account in deciding whether there is a sufficiently close connection between the actions of Mr Heath and the employee/employer relationship between Mr Heath/Tarmac. The question is whether or not that creates a sufficiently close connection.
>
> 63. I am not satisfied that the tensions that I accept were created by Tarmac in employing Roltech fitters to work on the same site as directly employed Tarmac fitters, and the fact that a Tarmac manager (Mr Grimley) was made aware of those tensions, create a sufficiently close connection between the relationship of employer/employee between Tarmac and Mr Heath and Mr Heath's wrongful act of hitting the two pellet targets with a hammer:

a) It is only one of the five factors identified by Lord Justice Longmore in *Graham v Commercial Bodyworks.* I accept nonetheless, that it is possible for that one factor to create a sufficiently close connection if, by itself it creates a strong enough connection;

b) I have accepted that there was, in turn, a connection between the friction between the Tarmac fitters and Roltech fitters and what Mr Heath did, because Mr Heath's desire to play a joke on Mr Chell and Mr Starr's desire to see that joke being played were connected to the ill feeling of Mr Heath and Mr Starr as Tarmac fitters towards Mr Chell; but

c) There is a spectrum of friction and confrontation. If the tensions created by Tarmac in putting Roltech fitters on site with Tarmac fitters had been so serious as to suggest the possibility of violence, or at least physical confrontation, I would have been more inclined to find there was a close enough connection between the tension which Tarmac was aware of, and Mr Heath's act, but the tension only consisted of Tarmac fitters making it clear that they did not welcome the presence of Roltech fitters on site and were worried about being replaced by Roltech fitters which Mr Chell said made him feel 'uncomfortable' (he did not say that he felt threatened);

d) I have found that Mr Heath did not intend to cause injury to Mr Chell. Rather, as Mr Chell accepted, it was a joke gone wrong, done for the amusement of Mr Heath and Mr Starr. It was Mr Heath's miscalculation of his actions, intended, no doubt, to make Mr Chell at least jump – if I may put it that way – and instead damaging Mr Chell's hearing, which was the cause of the injury. I do not consider that that, by itself, creates a sufficient connection between the employer/employee relationship between Tarmac and Mr Heath and Mr Heath's actions; and

e) In short, tension that was serious enough to suggest the risk of physical confrontation of which Tarmac were aware, where the wrongful act consisted of a deliberate violent act, would in my judgment have created a sufficient connection between the risk posed by the tension and the wrongful act. Tension however which consisted only of verbal confrontation not suggesting a risk of violence which made Mr Chell feel 'uncomfortable' where the wrongful act consisted of a joke not intended to cause physical injury (but which resulted in physical injury because of the recklessness of the wrongdoer) does not, in my judgment form a sufficiently close connection between the risk posed by the tensions on site and the wrongful act, such as to make it right to hold Tarmac liable under the principles of social justice "

18. Finally, Judge Rawlings considered the alleged direct duty owed by Tarmac to the Claimant. He found that, on his findings of fact, there was not a reasonably foreseeable risk of injury from a deliberate act on the part of Mr Heath or any Tarmac employee to the Claimant such as to give rise to the duty to take reasonable steps to avoid that risk, relying upon

- the lack of any threat of violence or suggestion that violence was at all likely;

- the fact that Mr Heath's suspension had been related to dishonesty and not threatening anyone;

- the fact that Mr Jones, although describing Mr Heath in his witness statement as "not the easiest person to work with" had not described him as volatile in any sense; and finally

- the fact that the availability of heavy and dangerous tools did not of itself create a foreseeable risk of injury.

19. Furthermore, the learned judge found that, even if he had found that Tarmac owed a duty to Mr Chell to take steps to protect him from a deliberate act causing him injury, Tarmac had not breached that duty. Having referred to Mr De Berry's submissions on the issue of risk assessment he said:

> "71. Horseplay, ill-discipline and malice are not matters that I would expect to be included within a risk assessment. Those acts, by their very nature, are acts that the employee must know are outside behaviour that they should engage in at work. I do not therefore accept that there was a failure by Tarmac to prepare a suitable and sufficient risk assessment because of its failure to identify in the risk assessments it has prepared the risk posed by horseplay, ill-discipline and malice."

Furthermore even if a risk assessment had identified horseplay, ill-discipline and malice as risks and had identified training and supervision as appropriate to reduce those risks he considered that:

a) The existing site health and safety procedures which included a section on general conduct stating "no-one shall intentionally or recklessly misuse any equipment" was sufficient given the multifarious ways in which employees could engage in horseplay, ill-discipline or malice and nothing more specific could reasonably be expected;

b) He did not consider that increased supervision to prevent horseplay, ill-discipline or malice would be a reasonable step to expect an employer to identify and take;

c) Education would not in this case have prevented Mr Heath from engaging in the index incident: Mr Heath was somebody who from his previous behaviour did not respect rules if he thought he could get away with flouting them having previously cheated his time records.

20. Finally, the learned judge considered two further factors: the tensions and frictions between Tarmac and Roltech fitters and, secondly, the suggestion that Mr Heath should have been dismissed or prevented from working unsupervised in the vicinity of Mr Chell. As far as the former is concerned, the learned judge, having referred to his

findings of fact in relation to the tensions and frictions between the Tarmac and Roltech fitters, found that, even if those circumstances represented a foreseeable risk of injury to Mr Chell (which he had found they did not), they did not represent a foreseeable risk of injury to the Claimant at the hands of Mr Heath so as to give rise to a duty to take action specifically in respect of Mr Heath. There was no evidence that Tarmac had failed to discipline Mr Heath properly after any previous incident. So far as the suggestion that Mr Heath should have been dismissed or not allowed to work unsupervised in the vicinity of Mr Chell, the learned judge found that this would have been inappropriate based on his factual findings as to what Mr Heath had done and not done prior to the index accident. Indeed, to have done so would have resulted in Tarmac breaching its contract with Mr Heath.

21. In the light of those findings, the Claimant's action was dismissed and, pursuant to permission granted by Murray J on 22 February 2020, the Claimant now appeals against the dismissal of his claim for damages by HHJ Rawlings.

The Claimant's arguments on appeal

22. For the claimant, Mr De Berry argues that the learned judge erred in failing to make certain findings of fact, and that, based upon the findings of fact that he should have made, he should have found that the Defendant was negligent both in its general failure to design and implement a reasonable system to maintain discipline on site, and also in failing to react appropriately to the tensions on site and the complaint of the Claimant in respect thereof. So far as vicarious liability is concerned, Mr De Berry argues that the learned judge approached the issue from too narrow a perspective and should have found the Defendant vicariously liable to the Claimant on the basis of a number of factors.

23. The findings of fact which, it is said, the learned judge should have made included that:

(i) Mr Heath had been engaged in the course of his employment immediately before the index event;

(ii) the Defendant failed to risk assess issues of training and ill-discipline, and ought to have devised a substantial policy in that regard;

(iii) there was a foreseeable risk of injury through horseplay and/or ill-discipline both generally and arising out of tensions on site and Mr Heath's past conduct;

(iv) the Defendant failed to investigate or manage the Claimant's complaint or respond to the tensions: had it done, concerns regarding Mr Heath and Mr Starr would have been identified;

(v) the Defendant failed to provide Mr Heath and Mr Starr with suitable training or instruction regarding discipline on site;

(vi) the Defendant failed to supervise or manage Mr Heath and Mr Starr at all at the material time.

24. In relation to the allegation of a general negligent failure to design and implement a reasonable system of maintaining discipline on site, it is argued that the learned judge was wrong to have required there to have been a specific risk to the Claimant of which the Defendant was aware before action was required. It is argued that with a large, national company operating in a quarry with dangerous equipment, it is incumbent upon such an employer to devise a disciplinary policy that covers training, supervision, management, instruction and disciplinary action. It is argued that, in the absence of any good evidence to that effect, the court should have concluded that no reasonable system was in place and, had one been in place, the index incident would have been avoided.

25. In his oral argument, Mr De Berry referred to the site rules disclosed by Tarmac and their generic risk assessment. The Site Rules contained a section on General Conduct as follows:

> "13. General Conduct
>
> 13.1 no one shall bring illegal drugs or alcohol onto the site.
>
> 13.2 No one shall attend work under the influence of drugs or alcohol.
>
> 13.3 No one shall intentionally or recklessly misuse any equipment.
>
> 13.4 Employees shall cooperate with their employer with any requirements relating to Health and Safety.
>
> 13.5 No employee shall leave the site in company time without informing their Supervisor.
>
> 13.6 No employee shall clock 'in' or 'out' any other employee's card."

The risk assessment, dated 11 January 2013, and ironically naming Mr Heath as one of the assessors, identified a number of hazards including electricity, slipping tripping and falling, hazards associated with swarf and hazards associated with the use of blades in machinery. It also identified a risk from manual handling. Mr De Berry submitted that the site rules and risk assessment hardly constituted a complete system such as would satisfy a court of law and he referred to the fact that there was no evidence as to how these documents were used. He submitted that employees should know that there is a framework of discipline by which they are bound, with a training regime, and that there should be actual supervision of the workforce such that they understand that they must stick to the rules. He submitted that in the absence of any evidence from the Defendant in respect of the training given to employees and in the absence of any policy in respect of control of the worksite, the learned judge should have drawn adverse inferences against the Defendant which should have led to a finding of breach of duty.

26. In relation to the specific situation that arose which led to this incident, Mr De Berry argued that the learned judge should have found the Defendant negligent in failing to react appropriately to the particular problems between the Roltech and Tarmac employees. It is said that the court should have found that an investigation was warranted and should have drawn adverse inferences from the lack of any documentary record of the Claimant's complaint and any evidence of steps having been taken in response to that complaint. It is said that the Defendant could and should have taken

steps to ease the tension or control the risks arising from that tension by applying greater supervision and monitoring or by separating the two employee groups or by removing people from site. Although the "6-pack" of Regulations (this being a reference to the six sets of Regulations brought into force in 1999 to ensure health and safety at work) did not cover discipline specifically, he submitted that the duty to protect from harassment, for example, puts an onus on the employer to regulate conduct at work, including between employees (or, as here employee and independent contractors on site) so that there is a policy or system of work to prevent improper behaviour.

27. So far as vicarious liability is concerned, Mr De Berry accepts that the judge correctly identified the two-part test arising from *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11. He also, appropriately and properly, draws attention to the later case of *Morrisons v Various* [2020] UKSC 12. However, he submits that the learned judge failed to give adequate consideration to the "close connection" test applied in sexual abuse cases, approaching the issue from too narrow a perspective. He submits that the following factors in favour of imposing vicarious liability should have led to such a finding:

(i) Mr Heath claimed to be lightening the mood after recent tensions in acting as he did;

(ii) the transition from working in the course of his employment to causing the explosion is likely to have been seamless and thus should more readily be understood as something within the course of his employment;

(iii) Mr Heath was acting due to an employment issue which could and should have been managed by the Defendant, there being no personal vendetta against the Claimant himself;

(iv) the Claimant was placed by the Defendant in a vulnerable position being a temporary worker faced with tension from a permanent employee;

(v) it was the employment that created the opportunity for the incident in Breen working men together with no apparent supervision, training or disciplinary policy and with Mr Heath and Mr Starr having licence to roam the site and sneak up on the Claimant;

(vi) the incident involved the use of work equipment, namely the hammer.

28. In the light of the above factors, Mr De Berry submits that the learned judge failed to step back and consider whether there was a sufficient connection between the position in which Mr Heath was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice. He submits it is significant that the learned judge found that education of Mr Heath and disciplinary matters would not have prevented the incident because Mr Heath was someone who did not follow the rules. On that basis, he argues that the Defendant had a duty to act against this rogue employee before this incident occurred and it is right that the court should impose upon the Defendant responsibility for their employee, who has led an innocent man to suffer a permanent disability, in such circumstances.

The Defendant's arguments on appeal

29. For the Defendant, Mr Lyons starts by reminding the court that an appeal is usually limited to a review of the decision of the lower court and the appeal court will only allow an appeal where the decision was wrong or unjust because of a serious procedural or other irregularity. An appeal court will only interfere with a judge's finding of fact where that finding is unsupported by the evidence or is one which no reasonable judge could have reached. He submits that, in a case such as this, the appeal court should have a great deal of deference to the primary findings of fact made below. He reminds the court of the dictum of Lloyd LJ in *Cook v Thomas* [2010] EWCA Civ 227 where he said (at paragraph 48):

   "… An appellant who seeks to show that the judge's findings of fact, or some of them, are unsustainable faces a seriously difficult task. … It has been said many times … that an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue."

30. On the above basis, Mr Lyons submits that the Court should reject the Claimant's complaints in respect of the learned judge's findings of fact. He submits that the judge made findings which he was entitled to make on the evidence before him, and in particular was under no obligation to draw the inferences which it is now said he should have drawn, whether from the alleged lack of documentary disclosure, the failure of the Defendant to call witnesses or otherwise.

31. In relation to the issues of negligence and vicarious liability, Mr Lyons essentially supports and seeks to uphold the findings of the learned judge in the court below. He submits that, the Claimant having accepted in cross-examination that there were no threats of violence, the learned judge was entitled to find that there was not a reasonably foreseeable risk of injury from a deliberate act on the part of any employee of the Defendant to the Claimant. This finding was underpinned by the learned judge's findings of fact and is therefore essentially unassailable. He submits that the learned judge was entitled to conclude that the Defendant's health and safety procedures were adequate, that increased supervision to prevent horseplay or ill-discipline was not a reasonable step for an employer to take and that a risk assessment would not have prevented the incident. So far as the suggestion that the Defendant should have reassured Mr Heath (and Mr Starr) that the security of their jobs was not at risk, Mr Lyons submits that this was not a point taken below, nor was there any evidence that this would have prevented the incident in question, nor could any such duty arise given the finding that the index incident was not reasonably foreseeable.

32. So far as vicarious liability is concerned, Mr Lyons submits that the learned judge was entirely right to adopt the two-stage test set out at paragraphs 44 and 45 of *Lister*, and that his application of that test to the facts of the present case was entirely correct. He submits that there was no error of law in the learned judge's findings and that the learned judge carefully weighed up the sufficiency of the connection between the wrongful act and the relationship of employer/employee.

Discussion

<u>Vicarious Liability</u>

33. It is appropriate to start with the issue of vicarious liability. If, as submitted on behalf of the Claimant, the learned judge misdirected himself as to the appropriate test to be applied, then this engages a pure question of law which, in theory at least, is wholly suitable for consideration on appeal.

34. However, having considered Judge Rawlings' approach to this question of law, and the principles which he derived from the authorities, as set out in paragraph 52 of his judgment (see paragraph 17 above), I can discern no error of law or misapplication of the relevant authorities. On the contrary, in my judgment the exposition of the relevant principles by the learned judge below was exemplary, fully and correctly reflecting the authoritative statements from the recent leading cases. As submitted by Mr Lyons, the learned judge correctly and appropriately adopted the two-stage test set out at paragraphs 44 and 45 of *Lister*.

35. The learned judge did not, at the time of his judgment, have available to him the judgment of the Supreme Court in *Morrisons v Various* [2020] UKSC 12 which, Mr De Berry concedes, makes clear that the temporal connection is less significant in itself, with more weight to be attached to the capacity and purported basis on which the perpetrator acts. In that case, "S" had worked for the employer as an internal IT auditor, and developed a grudge against the employer. He copied the personal data, including payroll data, of a large number of employees onto a USB stick. He took the stick home and uploaded a file containing the data to a publicly-accessible file-sharing website. He was convicted of various criminal offences. The employees claimed damages from the employer for misuse of private information, breach of confidence, and breach of statutory duty under the Data Protection Act 1998 s.4(4). The judge found that the employer was vicariously liable for S's wrongful conduct. The Court of Appeal upheld that decision but this was reversed by the Supreme Court which endorsed the general principle as set out in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48: the wrongful conduct had to be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it might fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That principle had to be applied with regard to the circumstances of the case and the assistance provided by the decided cases. The court had to consider two matters. First, it had to ask what functions or "field of activities" had been entrusted by the employer to the employee. Second, it had to decide whether there was sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable. The Supreme Court held that it was clear that "S" was not engaged in furthering his employer's business when he committed the wrongdoing but rather, on the contrary, he was pursuing a personal vendetta. Lord Reed's final comments are cited by Mr De Berry in his skeleton argument:

"47. All these examples illustrate the distinction drawn by Lord Nicholls at paragraph 32 of *Dubai Aluminium* [2003] 2 AC 366 between "cases … where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own', in the language of the time-honoured catchphrase." In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by Lord Nicholls in *Dubai Aluminium*

in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to 3rd parties, it can fairly and properly be regarded as done by him when acting in the ordinary course of his employment.

36. In my judgment, had Judge Rawlings had available to him the decision of the Supreme Court in *Morrisons v Various*, he would only have been fortified in the conclusions to which he had come and in his approach to this issue which, he would have found, and I find, was endorsed by the Supreme Court's judgment. I reject the suggestion that Judge Rawlings failed to give adequate consideration to the matters set out in paragraph 27 above. In particular, he rejected the suggestion that what Mr Heath was purporting to do was to lighten the mood after recent tensions. The fact that Mr Heath used a work implement, namely a hammer, was rightly regarded as wholly incidental to the act in question. The argument that "the transition from working in the course of his employment to causing the explosion is likely to have been seamless and thus should more readily be understood as something within the course of his employment" appears to me to be essentially a reference to the temporal connection which Mr De Berry conceded is of even less significance since the recent decision of the Supreme Court. In any event, I do not consider that this should have been taken by the learned judge as a significant factor in his evaluation of the situation.

Breach of Duty

37. So far as the allegations of direct breach of duty against the Defendant are concerned, in my judgment Judge Rawlings was right where he stated, at paragraph 71 of his judgment, that "horseplay, ill-discipline and malice are not matters that I would expect to be included within a risk assessment." Although I have only quoted from paragraph 13 of the General Site Rules so far in this judgment (see paragraph 25 above), this is only part of a much more extensive document dealing with health and safety including the use of personal protective equipment (safety helmets, steel toe-capped boots, hand protection, eye protection et cetera), the guarding of equipment, the reporting of accidents and incidents and safety rules concerning electricity: the existence of this document shows, as it seems to me, that this Defendant was an organisation that took health and safety matters seriously, as one would expect. The nature of the business carried out by Tarmac, and the nature of the site in question, meant that there were issues to be addressed which put at serious risk not just the health and safety of those on site but their lives. In this context, it is expecting too much of an employer to devise and implement a policy or site rules which descend to the level of horseplay or the playing of practical jokes. It is true that the learned judge had no evidence that the general site rules or the risk assessment had been specifically drawn to the attention of Tarmac's employees, but, in my judgment, he was entitled to decline the invitation to draw any adverse inferences against Tarmac arising from such lack of evidence, particularly where the miscreant in this case, Mr Heath, had been one of the assessors named in the risk assessment document. On the evidence, I consider that the learned judge was wholly entitled to come to the conclusion is that he did, namely that

(i) The existing site health and safety procedures which included a section on general conduct stating "no-one shall intentionally or recklessly misuse any equipment" was sufficient given the multifarious ways in which employees

could engage in horseplay, ill-discipline or malice and nothing more specific could reasonably be expected; and

(ii) Increased supervision to prevent horseplay, ill-discipline or malice was not a reasonable step to expect this employer to have identified and taken.

38. So far as the specific risk arising from the tensions between the Roltech employees and the Tarmac employees is concerned, it seems to me that the criticisms of Tarmac are very much made with the benefit of hindsight, and that the learned judge was right to view the matter from Tarmac's perspective, prospectively. It is true that Tarmac were aware of tensions between the two sets of employees and it is true that there was no evidence from the Defendant as to the steps Tarmac had taken to avoid or reduce those tensions. Furthermore, I take on board the point made by Mr De Berry arising from the evidence of Miss King that what she says would have happened can be translated into what should have happened in the absence of evidence that what she said would have happened did in fact happen. But the finding of the learned judge that the Claimant did not in fact ask to be taken off site is an important one: it reveals that the true level of concern on the part of the Claimant, and thus being imparted to Mr Gane and through him to Tarmac, was significantly lower than that being portrayed, retrospectively, by the Claimant at trial. The learned judge was, in my judgment, entitled to find that the situation as presented to Tarmac did not merit specific action in relation to Mr Heath where there was no foreseeable risk of injury to the Claimant at the hands of Mr Heath. Furthermore, the learned judge's findings in relation to vicarious liability impinge on this aspect too: if Mr Heath was acting in a way wholly unconnected with his employment, but for his own purposes and "on a frolic of his own", then it is more difficult to argue that the employer should have taken steps to avoid such behaviour.

Conclusion

39. In the circumstances, and despite the able arguments of Mr De Berry on behalf of his client, I take the view that the learned judge was right as a matter of law in relation to the issue of vicarious liability, and that he applied the law appropriately to his findings of fact, and that his conclusions in relation to the allegations of direct breach of duty on the part of Tarmac were ones to which he was entitled to come on the basis of his findings of fact. Furthermore, I do not accept that the findings of fact made by the learned judge were flawed, whether in relation to the actual findings he made or in relation to the findings which it is argued he should have made but did not. Reading the judgment as a whole, I came to the firm conclusion that the learned judge had considered the issues in this case properly, carefully and conscientiously, and that the judgment is not one susceptible to appeal. I have no doubt that the learned judge reached his decision not without some significant regret, given the misfortune that befell the Claimant and the circumstances in which the injury came to be sustained. I too have some significant sympathy for the Claimant in this regard, but sympathy cannot found a sound legal basis for a finding of liability. This appeal must be dismissed.