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Vicarious Liability and Employment Discrimination

Tower Boot Co. v. Jones [1995] IRLR 529 (EAT), Unreported CA, 11.12.1996
Waters v. Commissioner of Police of the Metropolis [1995] IRLR 531 (EAT)

The issue of employer liability for discriminatory acts committed by employees is complex and contentious. In tort, the established principle is that 'every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act' (*Bartonshill Coal Co. v. McGuire* (1858) 3 Macq 300). This may be justified by the consideration that the employer is the person best able to safeguard against the commission of tortious acts (by increasing safety standards), and the person best able to stand the loss, by insuring against it. It is less certain that the same considerations apply in the context of discrimination law: should an employer be held responsible for what may be individual acts of bias or malice, which the employer may have been powerless to prevent? Or does an employer have a duty to eradicate all expressions of racial or sexual hostility within the workplace? If an employer should be subject to liability at all, what should be the scope of that liability?

In seeking to resolve these concerns, both courts and legislature have clearly sought to balance the need to eliminate discrimination, and the interests of both the employer and the victim of discrimination in attaining a just and reasonable solution. Under section 41(1) of the Sex Discrimination Act 1975 and section 32(1) of the Race Relations Act 1976, an employer is liable for the discriminatory acts of employees, where those acts are done 'in the course' of employment. This provision has been stringently interpreted by the courts: under the principle established in *Irving and Irving v. Post Office* ([1987] IRLR 289), an employer is not liable for the unauthorised acts of an employee unless 'they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them.' The *Irving* decision therefore apparently confirmed that the same test for vicarious liability applies in the context of the Race Relations Act and the Sex Discrimination Act, as in the general area of tort law, and this decision has been accepted and applied ever since. However, recent rulings in the context of discrimination legislation have given rise to unease: is this tort-based definition truly appropriate in the quite different and varying context of discrimination, without modification or exception? The answer now given by the Court of Appeal is a resounding 'no'.

Two distinct issues are raised in this discussion. First, has *Irving* been misapplied, in the context of subsequent cases, and in terms of its own ruling? In other words, was *Irving* ever intended or designed to be applied to *all* situations involving racial or sexual discrimination in the employment context? If it was so intended, is the restrictive interpretation of the *Irving* test appropriate and correct, or is an alternative, broader approach both acceptable and necessary? These are the issues raised (and mostly answered) in the recent decision in *Tower Boot Co. Ltd. v. Jones*, a racial harassment case. The second, related issue is whether the vicarious liability doctrine should be applied in such a way as to jeopardise the effectiveness of existing discrimination legislation. This is of particular concern following the ruling in *Waters v. Commissioner of Police of the Metropolis*, which concerned the interpretation and application of the 'victimisation' provisions of the Sex Discrimination Act. In both of these cases, the *Irving* test was stringently applied by the EAT, with the result that the protection offered to victims of discrimination under the Sex Discrimination Act and the Race Relations Act was drastically reduced, in a manner that was arguably never intended by the legislature or *Irving* itself. This situation has now largely been rectified by the Court of Appeal in *Jones*, but a number of anomalies continue to exist.

The decision in *Jones* concerned a sixteen year old youth, who was subjected to severe racial harassment at work, consisting of racist abuse and insults, and a number of physical assaults. His arm was burnt with a hot screwdriver and then pushed into a lasting machine, metal bolts were thrown at his head, and his legs were whipped with a piece of welt. Despite his and his mother's complaints to a foreman, no statements were taken from any of the parties involved, and no action was taken against

the perpetrators, apart from moving one of them to the other end of the factory floor. This response was in breach of the employer's own rules, which provided that any acts of physical violence or intimidation toward any member of staff would lead to instant dismissal. The claimant continued to be subjected to racial harassment and intimidation, and ultimately resigned, having being in the respondent's employ for barely a month.

The argument in *Jones* centred on the employer's contention that the acts of harassment by the claimant's fellow employees were not done 'in the course' of employment within the meaning of section 32(1) of the Race Relations Act 1976. This was because they were not authorised by the employer, and were not an intrinsic part of the work which the perpetrators were employed to do. At the initial hearing, the Industrial Tribunal took the view that, if it accepted the employer's argument, it 'would be reduced to accepting that no act carried out by an employee can become the liability of the employer unless it was expressly authorised by the employer.' The Tribunal therefore held that the employee who assaulted the claimant with a screwdriver 'was authorised to use the screwdriver and was simply using it in an unauthorised manner.' However, applying *Irving*, the majority of the EAT held that the test for deciding whether an act was done 'in the course' of employment essentially depended on whether the wrongful act of the employee was so connected with that which he was employed to do, as to be a mode of doing it. Nothing in the circumstances of the assaults here could be described as an improper mode of performing an authorised task. Any other definition or conclusion would effectively involve rewriting the legal test. However, it was suggested that the claimant might be able to base a claim on the respondent's failure to investigate the allegations made (compare *Bracebridge Engineering Ltd. v. Darby* [1990] IRLR 289), and the case was remitted for adjudication on this point.

The first difficulty raised by the majority EAT judgment in *Jones* is this: if the proper test is whether the act complained of is so connected with the task in hand as to be a mode of doing it, the inescapable conclusion must be that few detriments suffered by employees can be legally attributed to the employer (see, e.g., *Cobham v. Forest Healthcare NHS Trust*, 24.1.95 EAT 916/93). The danger inherent in such a conclusion is particularly acute when dealing with issues such as sexual and racial harassment, which are unlikely to be deemed 'connected' to a valid employment duty, whatever effect they may have on the victim's employment morale, and however much control the employer might have exercised. Bearing in mind that an adequate code of conduct will usually operate to exonerate an employer in any event, under section 41(3) SDA, the stringency of the *Irving* test for vicarious liability, when applied in the context of racial or sexual harassment, is arguably both unfair and unnecessary. It might perhaps be argued that it would be unfair to penalise an employer who was unaware of any misconduct, with the result that it might be considered acceptable to apply *Irving* in circumstances where the employer was so unaware (although it is noteworthy that section 32(1) stipulates that an employer may be vicariously liable for an employee's action, 'whether or not it was done with the employer's knowledge or approval'). This, however, gives rise to a second difficulty: should the *Irving* test also govern a situation where the employer was aware of the workplace harassment, and permitted it to continue, without investigation or reprimand?

The decision in *Irving* related to racist comments maliciously inscribed on the plaintiffs' mail by an employee of the defendant, who was acting outside the scope of his employment duties, in breach of all of the defendant's regulations, and without the defendant's knowledge. Furthermore, the defendant reacted promptly to the plaintiffs' complaints, initiating a full investigation and taking disciplinary action against the culpable employee, when identified. In these circumstances, it was arguably reasonable to consider that the plaintiffs' and the defendant's rights were best vindicated by the application of a strict 'course of employment' test. (In fact, the Court of Appeal in *Jones* noted that the *Irving* judgments contain no reference to section 32 RRA, and that the Act itself is only referred to in general terms, leading to the inference that 'the Court of Appeal in that case dealt with the issue on the basis of vicarious liability as applied in the law of tort because both counsel invited them to do so' (per Waite L.J., at p.19)). However, the application of the *Irving* principle in *Jones* was questionable. As was pointed out in the minority EAT judgment, the facts were very different to

those in the earlier case: in *Irving*, the employer was not aware of the employee's acts until the complaint was made; in *Jones*, the employer had knowledge of the harassment through its foreman, and permitted it to continue. Furthermore, unlike in *Irving*, both the perpetrator and the victim in *Jones* were in the employment of the respondent. This gave the respondent more control over the situation, and arguably increased both the legitimate expectations of the victim and the duty of care and action on the employer. There therefore existed concrete grounds for holding that the cases were not equivalent, and should not be subjected to the same legal principles, particularly given the potential consequences of applying *Irving* out of context. As had been pointed out in *Darby* (above), in many cases an element of public policy is involved in deciding and applying the appropriate principles, and in *Jones*, a broader principle was necessary to avoid employers being enabled to escape from liability, where they had permitted abusive acts to continue.

In fact, even if the *Irving* test had to be applied in all employment discrimination contexts, it is possible that a broader interpretation might be given, than appeared to be recognised by the EAT in *Jones*. By permitting such serious misconduct to continue, the employers in *Jones* effectively condoned the perpetrators' actions. Given the message this lack of responsiveness must have sent to all concerned, it is arguable that the continuing acts of harassment occurred with the consent, and possibly the implied authority, of the employers, even though the harassment did not constitute part of the perpetrators' employment duties: this argument is especially strong when it is considered that the conduct tolerated by the employers was in flagrant breach of their own rules. If this argument were to be accepted, the *Jones* situation would fall within the principles outlined in *Irving*: '[t]he course of the employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master' (per Sheldon L.J., citing Kilbrandon L.J. in *Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad* [1974] 1 WLR 1082). Arguably, therefore, the 'course of employment' test as interpreted and applied by the EAT in *Jones* is less than comprehensive, particularly if a purposive approach is taken to the interpretation of the relevant Acts. As was emphasised in *Irving*, an employer should not be held liable 'merely because the opportunity to commit the wrongful act had been created by the servant's employment, or because the act in question had been committed during the period of that particular employment' (per Fox L.J. (added emphasis)): this is far from saying that an employer who is aware of abusive conduct and who permits that conduct to continue, cannot be held liable because the misbehaviour does not come within the perpetrator's job description.

In the event, many of these issues have now been resolved by the Court of Appeal. The decision of the EAT was unanimously reversed, and the respondents found liable for the harassment suffered by the claimant. Faced with a choice between continuing to apply *Irving* as generally understood, holding that it had been too strictly interpreted, and holding that it did not apply at all, the Court chose the last option. It was emphasised that there was insufficient similarity between an employer's liability for discrimination and vicarious liability in tort, to justify interpreting the phrase 'course of employment' as subject to the common law tort principles. A purposive approach is essential: Waite L.J. noted that the aim of the race and sex discrimination legislation is not merely punitive or compensatory, but educative, with key elements of both Acts designed to eliminate occasions for discrimination. In order to achieve these aims, it was necessary to take a broad approach to interpretation, with the result that 'course of employment' had to be given its natural, everyday meaning. The submission that Parliament could not have intended employers to be liable for extreme, unauthorised acts of discrimination was rejected. Waite L.J. considered that such an argument completely conflicted with the legislative scheme and policy, which was to deter harassment based on sex or race, by widening the liability of employers. The 'conscientious' employer, on the other hand, was still provided with an escape, as Parliament had provided a defence for employers who took all reasonable steps to prevent the occurrence or recurrence of discriminatory actions, a point also emphasised by McCowan L.J..

The new, 'normal meaning' test for employer liability will not result in liability for all employers in all circumstances. Even apart from statutory defences, Waite L.J. stressed that the interpretation of

'course of employment' will vary in different circumstances, with the result that the application of the legislation will also vary: possible grounds for distinction might be whether the discrimination occurred inside or outside of the workplace, in or out of uniform, or during rest periods. However, the overall ambit of the anti-discrimination legislation, and consequently of worker protection, will be greatly increased, and a major anomaly eliminated. In particular, employers giving tacit approval of discriminatory treatment, will be left with drastically reduced defences, even though the judgment of the Court of Appeal falls short of prohibiting discriminatory treatment with workplace consequences, as opposed to discriminatory treatment within the course of employment. This, however, is a legislative issue.

Of greater concern are the implications of *Jones* for other aspects of discrimination law, where a strict interpretation and application of *Irving* has also led to difficulties. Considerable problems have recently arisen with regard to the application of tort principles to the 'victimisation' provisions contained in both the Sex Discrimination Act and the Race Relations Act (section 4 SDA and section 2 RRA). These are designed to prevent or penalise the victimisation of employees who complain under the general discrimination provisions of either statute, as is necessary to preserve the effectiveness of the legislation. However, rather than simply providing for an independent civil sanction, a person ("the discriminator") who 'victimises' another person within the definition of either Act is deemed guilty of discrimination, as if he had discriminated directly on the basis of sex, marital status or race. In effect, the victimisation sections provide a separate basis of discrimination, the essential elements of which are (1) less favourable treatment (2) than an actual or hypothetical comparator (3) because of one of the grounds specified. Relevant grounds in each statute include the fact that the complainant brought proceedings under the Act against any person, or gave information or evidence in relation to such proceedings, or otherwise did anything in relation to the discriminator or anyone else under the Act, or alleged a contravention of the Act. Each section also applies if the discriminator knows or suspects that the complainant intends to do any of these things, or that he may already have done so. The provisions do not apply where the complainant's allegation is false and not made in good faith.

The principles of interpretation to be applied to the victimisation provisions were considered by the EAT in *Waters v. Commissioner of Police of the Metropolis*. The claimant here was a policewoman resident in a section house. She alleged a serious sexual assault by a fellow constable, which occurred in the claimant's room at a time when they were both off duty. Over the following months, the claimant reported the assault to no less than three officers and to a welfare officer. Her injuries were photographed, and an internal enquiry was held, but no disciplinary action was taken against the alleged perpetrator, and no prosecution was initiated. The claimant further alleged that she suffered harassment as a result of her complaint, but the report does not specify what form this harassment took, or the identity of the perpetrators. Ultimately, the claimant's name was removed from the list of constables qualified to carry out special search duties. The claimant was informed that this was done on medical grounds, but she denied that she suffered from any medical condition which would justify this action. She alleged that the removal of her name from the list constituted victimisation under s.4(1)(d) of the Sex Discrimination Act, which prohibits discriminatory treatment of a person where he or she has alleged the commission of an act which would amount to a contravention of the statute.

Both the plaintiff and her alleged assailant were off duty at the time of the alleged assault, and the attack itself was described as 'deliberate, unauthorised and unlawful'. The respondents therefore argued, on a preliminary point, that the alleged attack could not have been 'in the course' of the perpetrator's employment. Accordingly, the Commissioner could not be vicariously liable for the perpetrator's actions. Furthermore, since the perpetrator of the alleged assault was not the claimant's employer, no liability could attach to him under the Sex Discrimination Act 1975. Effectively, therefore, no actionable discrimination had occurred, so the claimant's allegations did not relate to any act which would be an offence under the Act. Accordingly, s.4(1)(d) did not apply. This submission was accepted by the Industrial Tribunal, and subsequently by the EAT. The claimant's submission that an allegation should be regarded as a protected act within section 4(1)(d) if it is a

bona fide complaint of a breach of the legislation, was rejected, as the EAT insisted on a literal approach to the interpretation of the Act.

The claimant argued that an employee could experience grave difficulty in gauging whether an employer would be held vicariously liable, and that protection should not be limited to those employees who 'got it right' at the time the allegation was made. The EAT classified this interpretation as 're-writing' the Act, and rejected the claimant's submission that the text should be interpreted as far as possible in the light of the purposes of the Act, and the provisions of the Equal Treatment Directive (EC 76/207).

It is submitted that the decision of the EAT was incorrect in this instance, and that the claimant's arguments were more in accord with the remedial principles of the Act (see generally the Labour Party White Paper "Equality for Women", September 1974 (Cmnd. 5724)). The danger is this: if an employer cannot be held liable for victimisation unless vicarious liability for the initial detriment is established, an employee is faced with a strong disincentive to make any complaint or take any action in respect of discriminatory acts. This is particularly so because an employee can never know, with certainty, what the ultimate finding on liability will be. This difficulty is somewhat ameliorated by the Court of Appeal's decision in *Jones*, which at least broadens the scope of employer liability. Yet, even there, it was emphasised that a finding of liability will depend on the particular circumstances of any given case: how, then, can an employee, even with the benefit of legal advice, be expected to determine an issue that may take a tribunal a full hearing to decide? Indeed, a case such as *Waters* would surely be likely to fall outside the legislation, even after *Jones*, given that the alleged assault occurred while the claimant and the alleged perpetrator were off duty - a situation akin to the 'rest period' situation suggested by Waite L.J. in *Jones*. Therefore, not only may an employee have no claim against the employer with regard to the initial detriment, but he or she may also be exposed to punitive conduct by that employer, without legal protection, irrespective of the degree of injury suffered.

The crux of the issue of victimisation, and the determinant of the merits of each case, ought surely to be the basis on which the employee acts *and on which the employer responds*. If the employer can be proved to be motivated by the desire to penalise an employee because he or she has made a bona fide allegation of discrimination, it is being discriminatory, irrespective of whether or not that complaint could be fully substantiated. Equally, the employee is just as surely victimised as if the employer could have been held liable for discrimination. Given the apparent policy behind the victimisation section, and behind the Act in general, why should it make a difference that an employer and employee both discover after the event that vicarious liability could not be established? This question becomes even more pertinent when viewed in the light of the continuing difficulties in establishing vicarious liability.

Waters does not render ineffective the whole of s.4, as only s.4(1)(d) may be argued to depend on the issue of vicarious liability. For example, s.4(1)(a) prohibits discrimination because of an employee's initiation of a claim under the Act (i.e., the victim 'brought proceedings against the discriminator or any other person under the Act...'). The ultimate success of the claim is irrelevant: what is prohibited is a punitive response by the employer, to the employee's utilisation of the enforcement machinery of the legislation. Indeed, even if the employee has not yet made a formal claim, it will be enough if the employer acts on suspicion that he or she might do so (section 4(1) SAD). Accordingly, employees in future cases might be well-advised to initiate a claim as soon as ever possible, or at least to threaten to do so (given the probable evidentiary difficulties in establishing a 'suspicion'), to pre-empt any retaliatory measures by the employer against which the employee might ultimately prove unprotected. Admittedly, section 4(2) provides that no protection is given to a claimant whose initial allegation is false and not made in good faith. However, this test is cumulative, not alternative, with the result that an honest claimant, making a genuine allegation (as apparently was the case in *Waters*), should be protected.

There are, however, a number of objections to the proposal that employees should simply manoeuvre themselves within other grounds of claim. First, it is highly unlikely that most employees will be sufficiently aware of the subtleties of the victimisation provisions, with the result that s.4(1)(d) must remain the most probable head of claim. On the other hand, if victims of employment discrimination receive adequate advice, it is arguable that an added incentive for employees to initiate claims may lead to a proliferation of litigation, at the expense of the internal resolution of employment grievances. Furthermore, employees may be rushed into making claims, before those claims are 'ripe' for bringing. For example, in *Darby*, vicarious liability was barely established: the essence of the employee's claim was the lack of adequate investigation by the employers. This type of claim requires the employers to be given sufficient time to deal with the issue raised, without which they are not likely to be held liable.

Second, the lack of protection for less 'aggressive' employees, who do not immediately initiate claims, or those without adequate legal advice, who are not aware that it is advisable to do so, may lead to a two-tier system of protection. Such employees' only available ground of claim may be under section 4(1)(d), and because they are unable to establish vicarious liability, they may be exposed to irremediable retaliation. If such employees attempt to evade the stringency of section 4(1)(d) by alleging that the employer acted 'on suspicion' that the employee intended to initiate a claim, or 'do anything under or by reference to' the Act (section 4(1)(c) SDA), there may be severe difficulties of proof. At the best of times, bringing a claim is a doubtful matter. How much more difficult will it be for an employee trying to establish a 'suspicion', rather than a definite awareness?

The third objection is one of policy. Even though *Jones* increases the scope of vicarious liability, establishing employer liability is still an uncertain matter. In a *Waters*-type situation, the protection afforded complainants is drastically reduced. Even if the worst effects of *Waters* can be avoided, by proceeding under another part of section 4, why should a more difficult and convoluted procedure be required? Given the aims and general 'equality ethos' of the legislation and the Equal Treatment Directive, it would surely be better to accept that a bona fide claim or allegation, even if ultimately unsubstantiated, should secure a claimant the protection of the Act. If this cannot be accepted by the EAT, or accommodated by the existing victimisation provisions, there is a case for parliamentary amendment of the legislation, as has already occurred in other contexts. Note especially the difference in the equivalent victimisation section relating to unfair dismissal: where a dismissal is based on the assertion of a statutory right, it is specifically provided that 'it is immaterial... whether the employee has the right or not and whether it has been infringed or not, but... the claim to the right and that it has been infringed must be made in good faith' (section 60A Employment Protection (Consolidation) Act 1978, as inserted by s.29(1) Trade Union Reform and Employment Rights Act 1993). However, this section does not apply to the Sex Discrimination Act or the Race Relations Act: this may be due to a legislative oversight.

The present position with regard to vicarious liability is unsatisfactory and in need of overhaul. Even though the tort-based understanding of employer liability adopted in *Irving* is no longer applicable in the context of discrimination law (as it effectively prevents discrimination law from achieving many of its objectives), anomalies still exist. Many situations continue to fall outside even the expanded principles espoused in *Jones* (*Waters* being a case in point). In particular, the predication of the 'victimisation' sections of the legislation on employer liability is both ill-considered and ill-founded. In this regard, a purposive approach to the legislation might be of assistance: it is difficult to believe that such a result as that in *Waters* could really have been contemplated, let alone intended, by those choosing to enact an anti-discrimination statute.

[DISCLAIMER]

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