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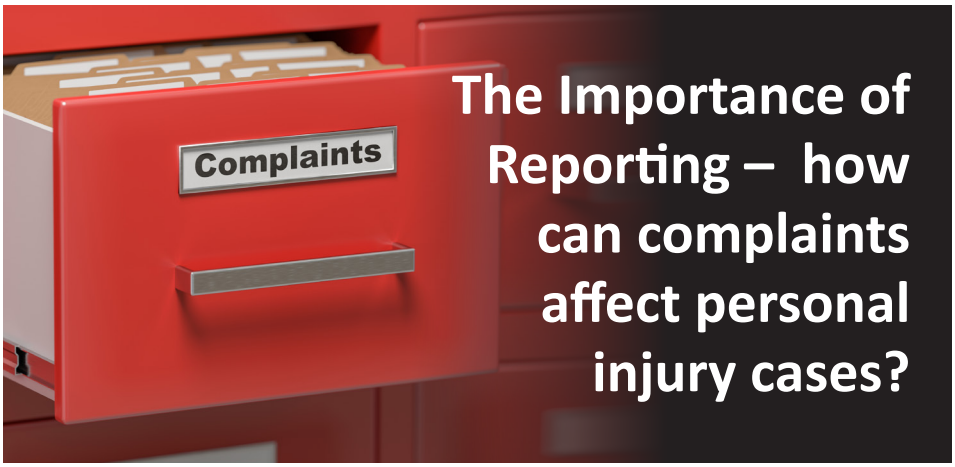
Legal Services Newsletter for GMB and CWU Members and their Families
MAY 2019



The Importance of Reporting – how can complaints affect personal injury cases?

When we think of complaining, we generally go and tell someone we are unsatisfied about something that has happened to us.

Complaints or reports, in personal injury cases are extremely important in proving negligence and the existence or a complaint can be a decisive factor in a personal injury claim. The fact an accident has occurred and an injury sustained is not self-proving of negligence on the part of a third party.

The common law test of "reasonable foreseeability" has to be overcome. Proving negligence where it cannot be shown that an employer knew or ought to have known about a specific risk is very difficult. So how can we overcome this hurdle?

The main problem regarding proving negligence is demonstrating that an individual or employer knew or ought to have known that the risks of a particular work practice, piece of equipment or work system would cause an individual to be injured. This is known as being "on notice."

Under Regulation 3 of the Management of Health and Safety at Work Regulations 1992/1999 an employer has a duty to undertake an appropriate risk assessment in respect of the work carried out by an employee. If an employer is aware, or ought to have been aware of a risk to an employee, and they do nothing to evaluate that risk, then they could be held to be in breach of the 1999 Regulations. However, what may be less well known is that the same regulations (regulation 14) provides a corresponding duty on employees to raise issues which present a danger to employees or shortcomings in the employer's health and safety arrangements.

Two cases which demonstrate the contrasting results of litigation when issues are reported and when they go unreported are the Supreme Court case of *Kennedy v Cordia* and *Egan v Glasgow City Councill.* In the landmark case of Kennedy v Cordia (Services) LLP. The Pursuer slipped on ice during the course of her attending her clients' properties to provide home care services. The risk of slipping on the ice had been reported on 4 previous occasions, each year since 2005, to Cordia. The Supreme Court held that an employer's suitable and sufficient risk assessment would have involved consideration of the previous complaints and would have led to them providing appropriate personal protective equipment to employees, thus reducing the risk of carers slipping on ice. This case illustrates the importance of employees in any work activity, highlighting to employers the danger of a particular job activity. It is then incumbent on an employer to carry out a sufficient risk assessment, following their complaints, to ensure that their employees are not in any way exposed to harm.

Another example where a report or a complaint can prove to be a key factor in proving the Pursuer's case, is the case of *Egan v Glasgow City Council.* A pupil support assistant raised an action against the local authority for an assault at work. The Pursuer had her hair pulled and was grabbed. The Pursuer argued that a lack of staff was the factor behind her injury and had there been the appropriate ratio of staff to pupils, the accident would not have happened. The Court held that there was no evidence that the events of the injuries were reasonably foreseeable by the Council. In other words, the Council was not on notice that there had been complaints regarding the behaviour of the pupils. The Court also held that an additional member of staff would not have stopped the injury from happening as it was completely unforeseeable, as it had not happened on a previous occasion. The Pursuer ultimately failed in her action for damages.

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) provides a mechanism for employers for the immediate reporting of injuries, near misses and other accidents at work that have, or would have, caused injuries. The Health and Safety Executive (HSE) or local authority must be told of a reportable incident otherwise criminal penalties follow. This mechanism of reporting should be used by employers where dangerous occurrences occur and enable them to learn from their issues. However, if a report of a near miss, incident which did not lead to injury or incident involving injury is to be made do so in writing via letter, email or, if available, online reporting system. Reporting an accident or a near miss are as important as each other as both help to highlight any unsafe systems of work or defective work practices that put the safety of employees in jeopardy.

It is clear that reporting accidents, near misses or other defects can be a decisive factor in the outcome of a personal injury action. HSE estimate that for every accident there are approximately 90 near-misses. Investigating near-misses provides your employer with the largest amount of data to assess shortcomings in working practice or equipment. However, more importantly it affords your employer the opportunity to fix these issues before injury or worse occurs. If you are in any doubt about something in your work, report it to management and ensure it is recorded as your report of an accident or near-miss can be the difference between a successful and unsuccessful claim.

To register a new claim or for any legal advice call UnionLine on: 0300 333 0303

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Help deliver workplace fairness – apply to become a non-legal Employment Tribunal member

With 340 non-legal Employment Tribunal members currently being recruited in England & Wales and Scotland, this is a great opportunity to help deliver workplace fairness.

You'd play a crucial part in delivering a fair hearing and a just outcome to those involved in employment disputes, contributing to the independent decision-making process, and deciding cases about alleged discrimination, harassment, victimisation, unlawful detriments during employment, equal pay and many other issues.

You don't need experience of Employment Tribunal advocacy. Full training will be provided.

Successful applicants would be paid a daily fee for when you sit on cases or are training. This role requires a high level of flexibility – you need to be available for a minimum of 30 days a year. Typically, you'll be required to sit on hearings that last from two to five consecutive working days, although can last several weeks.

You would sit alongside an Employment Judge (an experienced lawyer) as either an employer panel member (using your experience from an employer's perspective) or as an employee panel member (using that perspective). Non-legal members hold a diverse range of backgrounds – please visit **etnlm.resourcing-support.co.uk** for further details of the skills and experience required and the training provided.

Applications close on 14th June 2019

Employers must record Working Time

Q: Must an employer keep records of hours worked to fulfil its obligations under the Working Time Directive?

A: Yes, held the CJEU in Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE.

The CCOO is a trade union in Spain. It brought a group action before the National High Court in Spain against Deutsche Bank. The CCOO sought a declaration that the bank was under an obligation to record the actual daily working time of its employees. Hours worked on a particular day were not recorded.

AG Pitruzzella gave an opinion earlier this year suggesting that the Working Time Directive required employers to keep records of actual time worked. The CJEU has now agreed with the Advocate General. The court decided that if there was no requirement to keep records, it would be impossible to determine "objectively and reliably either the number of hours worked by the worker [or] when that work was done". The court went on to hold that:

"In those circumstances, it appears to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them by Article 31(2) of the Charter [of Fundamental Rights maximum working hours] and by [the Working Time Directive], with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that directive."

This judgment means that, in order to properly transfer the Working Time Directive into national law, a member state must require employers to keep records of hours worked. It appears that the Working Time Regulations, and the Northern Ireland equivalent, have therefore not properly transposed the Directive into UK law. The Government will have to amend both Working Time Regulations (or derogate from the Directive where allowed) to avoid the risk of claims against them for failure to transpose the Directive - if EU law remains in force in the UK of course!

UnionLine are here to help you – call us on: 0300 333 0303

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