SHERIFF APPEAL COURT

[2025] SAC (Civ) 7
PIC-PN18-22

Sheriff Principal N A Ross
Appeal Sheriff R D M Fife
Appeal Sheriff B A Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

TRACEY McGILL

Pursuer, Appellant and Cross-Respondent

against

RM PROPERTY AND FACILITIES SOLUTIONS LIMITED

Defender, Respondent and Cross-Appellant

Pursuer, Appellant and Cross-Respondent: Khurana KC; Jones Whyte LLP
Defender, Respondent and Cross-Appellant: Middleton KC, Richardson (sol adv); BTO Solicitors LLP

5 March 2025

[1] Ms McGill - the appellant - was employed as a part-time receptionist by the respondent at their mail depot in Glasgow. On 23 March 2020, the date upon which the country entered lockdown, Ms McGill took sick leave as a result of what was suspected to be Covid-19. She was absent from 23 March 2020 until 9 April 2020, at which point she returned to work as a key worker.

[2] Prior to her return, managerial employees of the respondent contacted Ms McGill to explain the different protective measures which had been instituted at the reception area of

the depot. These included a two-metre exclusion zone marked out with tape around the desk, moving the signing-in book away from the desk, a one-way entry and exit system and the provision of hand sanitiser. Such measures were consistent with the government guidance then in force. Ms McGill decided, in advance of her return to work, to purchase a protective screen due to her concerns about Covid-19. She wished to have the screen installed at the reception desk of the depot to protect her, and arranged for it to be sent to the depot.

[3] Ms McGill's line managers made an application for the protective screen she had bought to be installed at the reception desk. The request was refused on the basis that the existing protective measures were deemed sufficient. Between 9 April and 30 April 2020, Ms McGill was anxious and upset at work. She regularly complained to the respondent's employees about the lack of a protective screen at the reception desk. Additional measures were put in place, such as a protective barrier to enforce social distancing. Ms McGill was also supplied with a helmet, which had a safety visor. However, she did not find it comfortable and did not wear it consistently.

[4] On 30 April 2020, a meeting took place between the respondent's managerial employees at the depot, a trade union representative and Ms McGill. An explanation was again proffered as to why a protective screen had not been installed at the reception desk. Ms McGill was upset. As a result, she was allowed special leave to consider what she wanted to do next. Ms McGill went on sick leave and, in the event, did not return to her employment with the respondent. Her employment was terminated on 9 October 2020.

[5] Ms McGill raised an action on 5 January 2022. Her position at proof and in this appeal is that her pleadings gave fair notice of her claim, namely, that: (i) the respondent breached the duty of care owed to her by failing to install a protective screen at the reception

desk, upon becoming aware of the risk to her mental health and; (ii) the respondent was vicariously liable for bullying and harassment undertaken by their employees against her, which amounted to a breach of the duty of care owed to her and under section 8 of the Protection from Harassment Act 1997.

[6] The diet of proof commenced on 28 March 2023 for 4 days, with a further 4 days in November 2023. In March 2023, the respondent made two substantive objections to Ms McGill's claim. Firstly, the respondent objected to the leading of any evidence in support of any claim alleging breach of duty of care by the respondent due to a purported failure: (i) to carry out a mental health risk assessment; and (ii) to install a protective screen. The objection was made, firstly, on the basis that there were no averments on record to justify such a line of enquiry. Ms McGill's case on record was restricted to allegations of bullying and harassment alone. Secondly, the respondent submitted that Ms McGill's health and safety expert, Ms McNeill, lacked the necessary qualifications and experience to assist the court. The sheriff proceeded to hear the evidence under reservation of those objections, before giving his determination on whether to uphold or repel the objection in his judgment.

The sheriff's judgment

[7] The sheriff upheld the respondent's first objection. The clear focus of the pleadings was that Ms McGill had been subjected to a campaign of harassment, bullying and intimidation by the respondent's employees, and that it was this campaign that had caused her to suffer psychiatric injury. There was no averment that the respondent ought to have installed a screen, nor was there an averment that had a screen been installed she would not have sustained psychiatric injury. There was no averment about the need to conduct a

mental health risk assessment in relation to providing a screen or that the respondent's failure to do so had resulted in Ms McGill's psychiatric injury.

[8] Had the sheriff accepted that Ms McGill had pled relevant averments with respect to the failure to risk assess and install a protective screen, the sheriff explained that he still would not have found in favour of Ms McGill. This was due to a number of factors. Firstly, she had failed to prove that it was reasonably foreseeable to the respondent's employees that she would develop a clinically diagnosable psychiatric disorder as a result of a protective screen not being installed. The respondent did not owe a duty of care to Ms McGill, in the circumstances, to install a protective screen. Secondly, even if it had been the case that it was reasonably foreseeable she would develop a psychiatric disorder, the sheriff considered that, at best, it would only have been foreseeable to the respondent's employees on 30 April 2020 (the date of the meeting between Ms McGill, her line managers and her trade union representative), by which point it was too late to take any reasonable steps to avoid Ms McGill suffering psychiatric injury. Finally, the sheriff determined there was insufficient evidence to find that, even if a risk assessment had been undertaken by the respondent, which recommended a protective screen be installed, it would have been installed by 30 April 2020.

[9] The consequence of the sheriff upholding the first objection was that the evidence of Ms McNeill fell to be disregarded in its entirety. The respondent's second objection was that in any event none of Ms McNeill's evidence should have been admissible. The sheriff repelled the second objection. While there were certain limitations to Ms McNeill's evidence, she had sufficient qualifications and experience to assist the court in relation to the general health and safety issues that were contained in her report and oral evidence.

[10] Having considered the remaining evidence that was admissible, the sheriff held that the appellant's common law claim of negligence and breach of section 8 of the 1997 Act with reference to the bullying and harassment by the respondent's employees had not been established on the evidence.

Submissions for the appellant

[11] Senior counsel submitted that the sheriff erred in upholding the respondent's first objection. There were sufficient averments to put both the respondent and the court on notice that Ms McGill contended the respondent: (i) ought to have installed a protective screen and had failed to do so; and (ii) ought to have undertaken a mental health risk assessment, standing Ms McGill's condition and working conditions, and failed to do so. Senior counsel conceded that there was no direct averment that a mental health risk assessment ought to have been undertaken by the respondent. However, it was clear from the averments in condescendence [6] that Ms McGill averred the respondent owed a duty to take reasonable care. Two separate cases were pled. The sheriff had taken too narrow a view which had led him in error.

[12] As to the respondent's determination on the second objection, which was challenged in the cross-appeal, the sheriff was correct to hold Ms McNeill's opinion evidence admissible. Ms McNeill had sufficient expertise to comment on the practice that should be adopted by a health and safety practitioner within the respondent's organisation. She was entitled to provide an opinion to the court on the use of a protective screen. In any event, the respondent's criticisms of her evidence, if well founded, did not go to admissibility, but were rather a question of weight for the sheriff to consider.

[13] Had both objections been repelled, the evidence led at proof was sufficient for Ms McGill to prove: (i) that there was a foreseeable risk of psychiatric harm to Ms McGill; (ii) the foreseeability of such a risk was apparent to the respondent prior to 30 April 2020; and (iii) that had a mental health risk assessment been carried out by the respondent, a protective screen would have been installed prior to 30 April 2020.

[14] As to the other ground of the respondent's cross-appeal, the sheriff was entitled to make a finding that the respondent had failed to carry out a risk assessment based on the evidence given by the respondent's employees and Ms McNeill.

Submissions for the respondent

[15] Senior counsel for the respondent submitted that the sheriff was correct to uphold the respondent's first objection. In order for Ms McGill to give fair notice to the respondent of her case, she ought to have made a specific averment that the respondent was obliged to undertake a mental health risk assessment and that the respondent ought to have installed a protective screen. There had to be an averment that had such action been taken by the respondent, Ms McGill would not have suffered psychiatric harm. Such averments were entirely absent from the pleadings. Upon a detailed analysis of the averments made by Ms McGill, it was apparent that her action proceeded on the basis that the psychiatric harm she had suffered had been caused as a result of bullying and harassment by the respondent's employees. The suggestion that other items outwith the record, such as pre-litigation correspondence or an opposition to a specification of documents, could provide fair notice of her case was without merit.

[16] It had to be remembered that the diet of proof began on 28 March 2023. The respondent's two objections were both raised during the first week of proof. It remained

open to Ms McGill to lodge a motion to amend to attempt to cure the deficiency in her pleadings during that first week. No such motion was ever made.

[17] As to the respondent's second objection, while Ms McNeill's expertise may be relevant in certain cases, she simply lacked sufficient qualification and expertise to provide an opinion to assist the court on the facts of this case. Amongst a number of criticisms, the respondent contended that Ms McNeill had given generic evidence about the process of risk-assessment; she had never officially carried out any mental health risk assessments; she had not researched the government's Covid-19 guidelines in force at the relevant time; and she was unaware of the protections that had been put in place by the respondent.

[18] For her to fulfil her role as an independent expert in this case, Ms McNeill would have had to be in a position to place herself in the shoes of a reasonably careful and responsible employer at the material time and to draw upon any relevant personal experience or some other reliable body of knowledge. The material time, in this instance, was the start of the pandemic in early 2020. Ms McNeill's opinion evidence was *ipse dixit* and speculative. Ms McNeill's evidence ought to have been deemed inadmissible.

[19] If the sheriff was found to have erred in upholding the respondent's first objection, it was clear the sheriff understood that liability for psychiatric injury only attaches where a respondent ought reasonably to foresee the risk of the development of an actual clinically diagnosable psychiatric disorder, but fails to take reasonable steps to avoid the same: *Hatton* v *Sutherland* [2002] 2 All ER 1 at paras [23] and [27]. On the evidence, although the respondent's employees were aware of Ms McGill's anxiety and stress over the absence of a protective screen, they did not, nor could they have thought, that Ms McGill was at risk of developing a psychiatric disorder due to its absence. The sheriff did not err. There was no requirement for the respondent to install a protective screen.

[20] Even if he had erred, the sheriff was correct that the earliest the respondent and their employees could have had such awareness was 30 April 2020. There was no evidence of any factor that ought to have required the respondent to take any particular action, over and above the precautions already taken, to preserve Ms McGill's mental health prior to 30 April 2020, the date she was signed off work.

[21] Even if there were a foreseeable risk of a psychiatric disorder, Ms McGill had failed to prove: (i) by what date a protective screen ought to have been provided; (ii) what kind of protective screen should have been installed; (iii) what would have happened had a protective screen been erected; and (iv) that her psychiatric disorder would have been avoided had such a measure been put in place.

[22] In the event the appeal was allowed, the cross-appeal was maintained and, in addition to challenging the sheriff's refusal of the respondent's second objection, it was also submitted that the sheriff erred in holding that the need for a risk assessment, in the event there was a duty to undertake one, was readily apparent based on the evidence of two of the respondent's employees. As those employees were only aware of Ms McGill's anxiety and stress, and no more, there was no basis upon which the sheriff could have made the finding that he did.

Decision

[23] The appellant accepted that there were no formal averments about risk assessment in the pleadings. The words "risk assessment" or "mental health risk assessment" are absent from the pleadings. The averments in condescendence 4 do not assist the appellant's position on fair notice. As an example, averments that the appellant was "anxious" did not equate to psychological harm for which the respondent could be held responsible. The

discussions and interactions averred on record all took place during the first weeks of the Covid-19 pandemic in the UK, when the entire country was in lockdown.

[24] The grounds of fault are found at condescendence 6:

> "The pursuer's injury was caused by the fault and negligence of the defenders at common law. The defenders failed in their duty to take reasonable care for the pursuer as her employer. The defender knew or ought to have known that the conditions of the pursuer's employment were causing, and were likely to cause, psychiatric injury to the pursuer. The Defender's failed to take reasonably practical measures to reduce the risk of harm. Further and in any event, the pursuer's injury was caused by the fault and negligence of the defenders' employees for whose acts and omissions in the course of their employment with them the defenders are vicariously liable. Further and in any event, the pursuer's injury was caused by the defenders' breach of the statutory duties incumbent upon them in terms of section 8 of the Protection from Harassment Act 1997…"

[25] There is no common law case of fault on record based on a failure to carry out any risk assessment, quite apart from a mental health assessment, or to install a protective screen. These cases of fault are absent from the pleadings.

[26] The appellant invited the court to put to one side the statutory ground of fault and focus on the common law grounds of fault. That would be an artificial exercise and inconsistent with a statutory case, which supplemented the common law case of fault based on harassment, bullying and intimidation.

[27] The appellant submitted the respondent had made a concession that they had fair notice of the breach of duty case during the course of an incidental hearing on the appellant's opposed motion for a commission and diligence. They had not sought leave of the court to withdraw that concession. The appellant also submitted the respondent had fair notice of the case against them by reference to pre-litigation correspondence between parties. Further, Ms McNeill's report referred to such a ground of action.

[28] We do not accept that submission. There was no clear concession by the respondent at any point that they accepted there was such a case pled on record. It is not open to either

party to cast around for statements made, whether during pre-litigation correspondence or during incidental procedure in the action, in order to construe fair notice of a ground of action. The grounds of action are to be found in the averments on record. That is the whole purpose of the record. Only the very clearest of agreements, such as in a joint minute signed by both parties, will permit parties to innovate upon the averments on record. No such situation arises here. There were no relevant averments, and accordingly there was no relevant case in relation to the purported breach of duty concerning the installation of a protective screen.

[29] The Lothian and Borders Practice Note No 3, 2016 Personal Injury Actions states at Part 1: General: *Pleadings* paragraph 3:

> "While both the initial writ and statement of claim should contain only those facts that are necessary to establish the claim, it should be borne in mind that although brevity and simplicity of pleadings are encouraged, fair notice of the claim must be given…"

[30] The appellant failed to give fair notice on record to the respondent that she had common law claims for negligence for failure to carry out a mental health risk assessment and to install a protective screen. The sheriff did not err in upholding the objection of no record. We shall refuse this ground of appeal.

[31] In these circumstances, that disposes of the appeal. It is not necessary for the court to consider the remaining grounds of appeal. The cross-appeal is no longer necessary.

[32] Although we need not deal with the other arguments, we notice two elements of considerable concern in this action. The first is Ms McNeill's report, which purported to give expert guidance to the court on matters relating to medical foreseeability, but professed and displayed no such expertise. This evidence was not competent opinion evidence. A general awareness of health and safety guidance does not amount to expertise in

psychological injury. Parties have an obligation to ensure that expert evidence relates to the specific case. It is the court which decides whether evidence results from specialist knowledge on which it should rely, and is truly expert. The second is that this, a relatively straightforward proof, took 8 days of court time. Senior counsel were not involved at the proof stage. Much time appeared to be taken up in ultimately unproductive repetition of questioning and objection to evidence. Repetition in questioning witnesses must be exercised with discernment. Repetition in motions made to the court is rarely necessary or justified. These appear to have significantly contributed to delay and expense in the resolution of this action.

Disposal

[33] We will refuse the appeal, dismiss the cross-appeal and adhere to the sheriff's interlocutors of 4 and 26 January 2024. Parties agreed that the matter of expenses should be reserved. Parties should attempt to agree the matter of expenses and advise the clerk of their position. Should that not be possible within 21 days of the date hereof, the clerk will arrange further procedure.