

## ■ ■ Lords impose control test on the Provision and Use of Work Equipment Regulations 1998

The recent decision in **Smith v Northamptonshire County Council [2009]** UKHL has narrowed the ambit of the Provision and Use of Work Equipment Regulations 1998 (PUWER) but not without some considerable debate taking place in the House of Lords.

Mrs Smith was employed by the Council as a carer and driver. On the day of her accident she was to collect Mrs Cotter, a wheel chair user, from her home and to drive her to a day centre. There was a wooden wheelchair ramp in place outside Mrs Cotter's home and, as Mrs Smith took Mrs Cotter down the ramp, it crumbled beneath her causing her to stumble and to suffer an injury.

The ramp had been installed about 10 years earlier by the NHS. Whilst it did not belong to them, the Council carried out their own assessment of the ramp for the purpose of ensuring Mrs Cotter's safety. The Council also trained their employees to perform a visual check of the ramp every time they visited Mrs Cotter's premises. It was not in an obvious state of disrepair prior to the accident.

Mrs Smith argued that the ramp had not been maintained in an efficient state and in good repair and that the Council were in breach of the absolute obligation imposed by regulation 5(1) PUWER (*Stark v Post Office* [2000]).

His Honour Judge Metcalf found for Mrs Smith at first instance but the Court of Appeal upheld the Council's appeal. Mrs

Smith was given permission by the House of Lords to appeal.

The first issue would have been whether the ramp was work equipment. The definition provided by regulation 2(1) PUWER is as follows:

“Work equipment” means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)”.

**Spencer-Franks v Kellogg Brown and Root Ltd and another [2008]** was heard by the Lords before Mrs Smith's appeal reached them and their judgment provided useful guidance in relation to this first issue. It was held in *Spencer-Franks* that whether an item is ‘work equipment’ depends upon whether or not it performs a “useful practical function in the employer's undertaking”. As a result of the *Spencer-Franks* judgment the Council conceded that the ramp was work equipment.

The remaining issues to be determined by the Lords concerned whether the Regulations applied to the ramp. Regulation 3(2) PUWER provides that:

“The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.”

Those issues were:

- ❑ what is the proper construction of the words “... for use or used ... at work”?
- ❑ was the ramp provided for use at work for the purposes of regulation 3(2)?

Mrs Smith’s appeal was dismissed by a majority of 3 to 2, Lord Hope and Baroness Hale dissenting.

Lord Hope considered that control was required but that it was sufficient for Mrs Smith to prove that the Council had control over her use of the ramp. Baroness Hale was not convinced of the need for control at all and thought that an employer’s knowledge and authorisation of the use equipment for the purposes of the Claimant’s employment was sufficient for the Regulations to apply.

In his leading judgment, Lord Neuberger focused on the nature of the control which an employer had to have over the equipment, advocating a more limited view of the Regulations’ intended scope. He underlined the legislative intention behind PUWER as not being to create an “infinitely wide” range of circumstances wherein strict liability could be imposed on employers. Lord Neuberger rejected the argument that the Council should be found liable because they had previously inspected the ramp, pointing out that this would be relevant in a negligence claim only.

Lord Mance’s starting point was Article 3 (1) of the Work Equipment Directive (89/655/EEC) which imposes responsibility

upon employers for “work equipment made available to workers in the undertaking and/or establishment”. He held that this Directive indicated that the Regulations should only apply where the equipment has been incorporated into and adopted as part of the employer’s business.

Lord Carswell agreed with Lord Mance that the ramp did not come within the Council’s undertaking or establishment, extrapolating that it could not, as the Council neither supplied nor repaired it.

The Lords have provided a two stage test to apply when considering claims brought under PUWER.

- 1 Is the item work equipment?  
The pre-existing “practical, useful function” test provided by Spencer-Franks still applies.
- 2 Do the Regulations apply to the specific equipment? A claimant must show more than control over the use of the work equipment. He will need to prove control over the equipment itself. We now know that the fact that an employer has assessed or inspected the equipment will not amount to sufficient control for the purpose of the Regulations.

The wording of regulations 3(2) and 2(1) had appeared to be very broad but the Lords have narrowed their breadth. Their decision to place a more realistic burden on employers will be welcomed by insurers.

**Smith v Northamptonshire County Council [2009] UKHL 27**

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