

**EVERATT
& COMPANY**

S O L I C I T O R S

STRESS CLAIMS: AN ALTERNATIVE ROUTE

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RISK MANAGERS' FORUM

The Civil Framework

Negligence

- Employer owes a duty of care
- Employer must have breached that duty
- Employee must have suffered an injury
- Employee's injury must have been caused by the Employer's breach of duty
- Employee's injury must have been reasonably foreseeable
- Any separate psychiatric consequences of breach of duty must amount to a recognised psychiatric injury

Duty Of Care

- Sufficient proximity between the parties
- Fair and reasonable to impose a duty of care
- Injury to the Claimant is reasonably foreseeable

What Is Reasonably Foreseeable ?

- Hatton –v- Sutherland
- Upheld by Barber –v- Somerset County Council
- Hartman –v- South Essex Mental Health Trust and Others [2005]

Breach Of Statutory Duty/Breach Of Regulation

It is necessary to show that:

- The statutory provision gave rise to a civil liability
- The Defendant has breached that duty and there was a duty owed to the Claimant.
- The breach of duty caused damage to the Claimant
- The damage was of a kind contemplated by statute

NB

- It is not necessary to show foreseeability.
- A Claimant can be compensated for loss and damage sustained as a result of statutory tort.

Statutory Provision/Regulation In The Context Of Bullying And Violence

CONSIDER:

- The Sex Discrimination Act 1975
- The Race Relations Act 1976
- The Disability and Discrimination Act 1995
- The Discrimination on Grounds of Sexual Orientation, Religion and Belief Regulations 2003
- The Employment Equality (Sexual Orientation) Regulations 2003
- The Protection from Harassment Act 1997

SHERIFF –V- KLYNE TUGS

- Authority for the proposition that an Employment Tribunal has jurisdiction to award compensation by way of damages for personal injury caused by the statutory tort, in that instance of unlawful discrimination

The Impact Of Majrowski –V- Guys And St Thomas‘ NHS Trust (2005)

Impact

Convenient bypass of the ordinary common law constraints on stress at work claims in which:

- Claimants need not prove foreseeability of harm or personal injury
- Where anxiety will substitute for a recognisable psychiatric condition
- Whereby virtue of section 11(1A) of the Limitation Act 1980 the ordinary 3 year rule of limitation for personal injury claims has been disapplied (limitation is 6 years)
- Such claims do not attract compulsory employer's liability cover under the Employer's Liability (Compulsory Insurance) Act 1969
- Vicarious liability is not restricted to common law claims. An employer can be vicariously liable for breach of statutory duty imposed only on its employee so long as it is fair and just to impose vicarious liability and so long as there is a close connection between the employees offending conduct and the nature of his employment.

The Impact Of Majrowski –V- Guys And St Thomas‘ NHS Trust (2005)

Impact continued...

- An employer can be vicariously liable under section 3 of the Act for harassment in breach of section 1 of the Act, committed by one of its employees in the course of his employment
- There is no reason why a corporate employer should not have the same vicarious responsibility as a non-corporate employer for his employees breaches of statutory duty
- Wealth of Authority support a view that an employer could be vicariously liable in civil proceedings for his employees criminal conduct even if the employer could not be held criminally liable for that conduct

Protection Measures

- Constraints provided by the Act at section 1 where it prohibits "a course of conduct" amounting to harassment. It takes more than a single act of an employee in the course of his employment to engage the liability of the employer
- To succeed in claims under section 3 the Claimant must establish to an objective standard at least that the conduct amounts to harassment usually in the sense of it being likely to alarm or cause the Claimant distress.
- Conduct must make it just and reasonable in the circumstances of the case to compensate the Claimant by application of the "close connection" and/or "reasonably incidental risk" criteria

Breach Of Contract

- Breach of implied contractual duty to take reasonable care to ensure the safety of an employee at work.
- Breach of implied contractual term of mutual trust and confidence.
- It is possible to recovery for psychiatric injury flowing from breach of contract provided it is not too remote. Consideration needs to be given to what was in contemplation of the parties when the contract was made
- Lord Steyn: Frost –v- Chief Constable of South Yorkshire Police [1999] 2AC.455 "... the duty of an employer to safeguard his employees from harm could also be formulated in contract. In that event, and absent relevant express provisions, a term is implied by law into the contract as an incident of a standardised contract ... but such a term could not be wider in scope than the duty imposed by the law of tort"

Main Differences Between Bringing A Claim In The Civil Courts And Bringing A Claim In The Employment Tribunal

Commencement

Civil Court

- Claimant prepares Claim Form, Particulars of Claim and files them with medical evidence and Schedule of Special Damage.
- Claimant pays an issue fee on a sliding scale usually between £120 0 £1,700.

Employment Tribunal

- Claimant completes and files Form ET1
- Claimant does not have to pay a fee

Progress of Claim

Civil Court

- On filing of Defence Allocation Questionnaire is issued. Claimant returns Allocation Questionnaire with fee to the Court. Thereafter Directions are given to bring the case to final hearing usually within about 15 months.

Employment Tribunal

- On filing of ET3, ET issue Directions (no fee payable) to bring matter to final hearing within 3 – 6 months.

Conclusion Of Claim

Civil Court

- Judgment. Winner normally recovers costs from loser.
- Interest awarded on damages.
- Right of appeal.

Employment Tribunal

- Decision. Although ET have limited power to award costs still rarely exercised.
- No interest on award.
- Right of appeal.

Conclusion

If the Claimant can bring their claim in the Employment Tribunal the benefits are:

- Easier
- Quicker
- Less of a risk (costs)

What Can A Claimant Claim For In The ET

- Unfair Dismissal
- Breach of Contract
- Discrimination

Unfair Dismissal

Can the ET award damages for Personal Injury ?

- *Dunnachie –v- Kingston-upon-Hull City Council* (2004)
- House of Lords overturn Court of Appeal
- Claimant cannot recover non-economic loss

Contractual Claims

- ET has Jurisdiction to hear claims for breach of employment contract and can award up to £25,000
- Articles 3 and 4 of the employment Tribunal extension of jurisdiction (England & Wales) Order 1994 provides ET has no jurisdiction to deal with a P.I claim arising out of breach of contract

Discrimination Claims

- The Sex Discrimination Act 1975 (SDA)
- The Race Relations Act 1976 (RRA)
- The Disability Discrimination Act 1995 (DDA), and
- The Discrimination on Grounds of Sexual Orientation, Religion and Belief Regulations 2003
- NB 2006 will see the introduction of unlawful discrimination on grounds of age

Discrimination Claims Continued...

- Breach of statutory provisions regarded as statutory tort
- ET can award compensation as the County Court would – no limit on amount of award
- Compensation can include:
 - damages for physical injury
 - damages for psychiatric injury
 - damages for injury to feelings
- No need for Claimant to pass the reasonable foreseeability test (Sheriff –v- Klyne Tugs (Lowestoft Ltd) (1999))
- No need for there to have been “a recognisable psychiatric injury”

Discrimination Claims Continued...

Discrimination claims often include allegations that the unlawful discrimination has caused

- Stress and anxiety
- Injured feelings
- Psychiatric injury
- Psychiatric injury
- Physical Injury
- Inability to return to work

Consequently awards often include large awards for loss of earnings (past and future) as well.

Discrimination Claims Continued...

Discrimination claim figures for 2003 / 2004

Race Discrimination

■	Maximum award	£635,115.00
■	Median award	£8,410.00
■	Average award	£26,660.00

Sex Discrimination

■	Maximum award	£504,433.00
■	Median award	£5,425.00
■	Average award	£12,979.00

Disability Discrimination

■	Maximum award	£173,129.00
■	Median award	£5,652.00
■	Average award	£16,214.00

Discrimination Claims Continued...

- Vento –v- Chief Constable of West Midlands Police (CA) 2003

Guideline figures for injury to feelings

- Top band £15 - £20,000
- Middle band £5 - £15,000
- Lower Band £500 - £5,000

General Procedural Matters

- Time for presenting a claim to the ET
- When does time begin to run
- ET Jurisdiction to disapply time limit
- Impact of Employment Act 2002 (Dispute Resolution) Regulations 2004

Conclusion

- In discrimination claims the Claimant has an alternative route to compensation for stress / psychiatric injury
- Discrimination claims are a “trap” for the unwary employer (and their insurers)

EMPLOYER'S LIABILITY (COMPULSORY INSURANCE) ACT 1969

What Does An Employer's Liability Policy Cover In Terms Of Stress, Bullying And Violence?

"If any Employee whilst employed in or temporarily outside the United Kingdom on the business of the Insured, sustains Bodily Injury caused during the Period of Insurance and arising out of or in the course of employment by the Insured the Company will subject to the terms of this policy indemnify the Insured against legal liability for damages, costs and expenses up to the limit of indemnity provided that

- a) The action for damages is brought against the Insured in a Court of Law outside North America ...
- c) The Insured shall give notice in writing to the Company
 - i) immediately on, or not later than 24 hours from, receipt of notice of any impending inquest, fatal accident enquiry, prosecution or other legal proceedings,
 - ii) immediately on, or within 48 hours from, receipt of notice of an Industrial Tribunal Hearing that includes alleged bodily injury ..."

What Is Bodily Injury?

"Bodily Injury including but not limited to death, disease, illness, physical and mental injury or mental anguish, but excluding injury to feelings"

The policy will not cover:

- Injury to feelings
- Financial losses that flow from breach of contract and not from injury

What To Do When A Claim Is Notified

- In the Civil Forum; Obligation to notify Insurers in accordance with policy terms
- In the Employment Tribunal; Obligation to notify Insurers of claim that includes bodily injury within the definition of the policy.

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