

QBE: Issues Forum - Stress Policy An Employer's Liability for Workplace Stress

Work related stress is a much commented upon phenomenon of 20th and now 21st century society. Heavy work demands, a long hours culture, downsizing and lack of resources with a requirement to do more with less are for many, a feature of the modern employment experience. Employers and their Liability insurers have noticed the backlash. A significant increase in the influx of civil claims for compensation was evident during the last half of the 1990's. Handling such claims was far from straightforward, due in part to uncertainty in the law. What were the employer's duties? Whilst they could be stated using traditional formula, matching them to the complex matrix of facts in specific stress cases was fraught with difficulty and susceptible to a wide variation in approach at first instance. The frequently stated precedent of *Walker v Northumberland County Council* [1995] 1 All ER 737 was a case on quite special facts not often replicated.

The uncertainty was dispelled following the Court of Appeal judgment of 5th February in *Terence Sutherland v Hatton* being one of four consolidated appeals, the fourth case of *Baker Refractories v Bishop* being sponsored by QBE.

In each case judgment had been obtained by claimants against employers for psychiatric injury said to have been caused by stress experienced in the work place. The defendants appealed. In three of the cases to include *Bishop* and *Hatton* the appeals were successful.

Two of the claimants were teachers, one a local authority administrative assistant and Mr *Bishop* a factory worker responsible for receiving deliveries of raw materials.

The Court took the opportunity to review the law and to restate settled matters of principle as they relate to work related stress. Helpfully the judgment summarises a number of key points as "practical propositions" to guide the lower courts, and others, to include:

Ordinary principles of employer's liability apply. There are no special control mechanisms in work related stress, akin to those in the law controlling shock cases where distinction is drawn between primary and secondary victims. This confirms the approach taken in *Petch v Commissioners of Customs and Excise* [1993] ICR 789.

The question of the appropriate standard of care or the extent of duty owed, the threshold question, is answered by dealing with the actual injury arising as opposed to the occurrence of "stress" at work.

Assessment of foreseeability is based upon what the employer knows, or ought to know, of the particular employee's characteristics. However, it is recognised that mental disorder is harder to foresee than physical injury. An employee for a host of good reasons may not reveal difficulties or illness. An employer is entitled to assume that the employee can withstand the normal pressures of work, unless the employer knows of a particular vulnerability.

No category of employment is more dangerous than others by virtue of job content alone. Work in public service such as social work, police or fire services is not more intrinsically dangerous than work in factories, offices or shops. It is the interaction between the job and the individual that may cause harm. Stress is subjective being the individual's perception of pressures applied by their occupation contrasted with their own view of their ability to cope.

When considering whether the employer has stepped over the threshold in to breach of duty the factors for consideration include:

- The nature and extent of the workload
- The intellectually or emotionally demands of the job
- Whether demands are in line with those in comparable jobs
- Signs that others on the same work are suffering from harmful levels of stress
- Absenteeism levels
- The individual's absence record
- Unusual levels of complaints
- Signs of harm from stress at work
- The characteristics of the individual and any history work of stress related illness

The employer is entitled to take what he is told by the employee at face value unless he has good reason to think otherwise. Searching enquiries of employees are not expected and may be intrusive and unwarranted.

For the employer to have a duty to take steps, it must be plain that occupational stress is a source of imminent harm and that any reasonable employer would act.

When considering an employer's failure to act attention should be given to the magnitude of the harm and risk of occurrence as balanced against the costs and practicability of prevention.

The size of the employer's operation and resources available will be relevant context when considering what was reasonable. Job transfers, assistance, mentoring, and reallocation of work, may be responses considered but they will not be available to all employers depending on the nature of their

business. The interests of other employees, who may receive additional work as a consequence of reorganisation to combat the stress suffered by a given individual, should also be considered. It is a matter of balance.

An employer is only expected to take steps that may do some good. What would have been appropriate may be a matter of expert evidence. Often the only safe measure may be to dismiss. However, the law does not require that an employer sack an employee who wants to go on working. The employer should though make the workplace as safe for that individual as far as is reasonably practicable.

In each case the correct approach is to determine what the employer could and should have done bearing in mind all the factors that have to be weighed up.

An employer who provides a confidential advice service making counselling or treatment of appropriate quality available to employees is unlikely to be in breach of duty

The employee has to show that the breach of duty, as opposed to the stress of work, has caused or made a material contribution towards development of the injury. Stress is very much in the individual's perception as to how they cope with work demands.

Where harm is caused by a confluence of work and non-work related factors, the employer should pay only for that proportion of harm, which can be attributed to his breach of duty. The onus is on the defendant to raise this issue of divisibility. Once raised, a broad-brush approach to apportionment may be sufficient to do justice between the parties.

Issues as to the claimant's pre existing disorder, vulnerability or special characteristics are dealt with in damages. The courts can find that damages be awarded on an aggravation or exacerbation basis or that future losses are curtailed by the likely alternative path, which the claimant would have followed but for the "exposure" at work.

The Bishop case illustrates how these principles can be applied.

Mr Bishop worked for the defendant's from 1979 to February 1997 when he suffered a "mental breakdown". His employers had introduced new shift patterns in 1994 reorganising work so that a greater variety of tasks were performed. Most employees welcomed the diversity. Mr Bishop did not adapt. He complained to his manager wanting his old job back. A colleague highlighted Mr Bishop's difficulties. These were complaints of struggles with the job, not of health problems so caused.

The employers could do nothing. The old job did not exist. The new job was not especially demanding. Mr Bishop was reassured that his performance

was satisfactory. The employer was not on notice of any mental health difficulties, partly because these were concealed. Mr Bishop discussed matters with his GP who advised him to give up work. He did not share this advice with his employers. He wanted to continue and did so. He went off work with "neurasthenia", returning for two days to his normal job before suffering his breakdown, never to return. On the medical evidence his injury was caused by work stress.

At first instance the employers were found liable for failing to heed the complaints made, failing to investigate the GP sign off and put in place a safe return to work regime. Alternatively they had a duty to dismiss the claimant for his own safety.

Applying the principles set out, the Court of Appeal had little difficulty in allowing the appeal as:

- The complaints were of stress at work, that being insufficient without more to put the employers on notice of foreseeable harm.
- The employer was not aware of the employee's difficulties and was under no duty to make a special investigation.
- The GP sign off did not put the employers on any special duty to investigate especially as an unusual medical term was used.
- Had the employers been aware of Mr Bishop's problems they would have been under no duty to dismiss him.
- The other successful appeals shared common features.

Whilst the individuals may have complained about workload or other perceived unsatisfactory features they made no complaint of ill health or that they felt at risk of ill health. Actual problems were sometimes concealed as in Bishop.

In the absence of clear indicators of real risk to health it seems that courts will now be slow to fix employers with knowledge of foreseeable harm. Psychiatric ill health is not as conspicuous as other forms of illness and may not be apparent even to an alert employer. Individual workload factors alone are likely to be insufficient to found a claim. Stress at work, a relatively normal requires foresight of some mental injury.

Once the employee has gone off work, what are the employer's duties upon his return? Provided that there is sign off by the GP the employee is implying that he believes himself to be fit to return to his previous occupation. The employer can take this at face value unless he has other information to the contrary.

The court was attracted to the growing use of confidential assistance scheme. The advantage for the employees is that difficulties can be aired without prejudicing career or promotion prospects, a factor frequently

causing employees to suffer in comparative silence. Help could be obtained and problems addressed. Whilst this type of facility was most likely to be found operating within larger scale employers, where it operated successfully, the court took the view that "an employer who does have a system along those lines is unlikely to be found in breach of his duty of care". Such schemes therefore, as well as being a sensible risk management tool now provides a high degree of protection in civil cases.

Divisibility of damage was addressed hot on the heels of the Court of Appeal decision in *Fairchild v Glenhaven Funeral Homes*. The court was conscious that the causation of psychiatric conditions could be multifactorial. Issues unrelated to work such as difficulty in family and other relationships, illness and bereavement might play a part. Where such factors worked in tandem with breach of duty at work to contribute towards injury the Court took the view, that at the defendant's instigation, damages should be capable of apportionment even by way of a broad-brush approach. This must be distinguished from arguments as to the claimant's pre existing vulnerability. Once there has been a breach of duty the defendant must take the claimant as they find him. The eggshell personality therefore will recover damages.

The contrast with the one appeal that failed in *Sandwell MBC v Jones* is illuminating.

In *Jones* the employee was an administrative assistant in local government. On the facts she was relatively junior, undertaking the work of two or three people. Deadlines were tight. She worked long hours. She made complaints to management of over work and unfair treatment, crucially putting these in the context of her health. The complaints continued. The need for assistance was identified and plans were put in place. However, the planned help was diverted away from Mrs Jones by a middle manager. She complained of harassment by the middle manager. On the medical evidence she suffered injury arising from her work experience.

The Court of Appeal found but "not without some hesitation", that the court at first instance was entitled to find a breach of duty which had contributed to Mrs Jones illness. The key was the foreseeability of injury made plain by the particular facts, contrasting as such with the other cases.

The first case to follow *Hatton* was the case of *Young-v-Post Office* (2002) EWCA Civ 661.

That case highlighted the following issues:

How strong is the position of the employer before he has cause to believe that his employees may be susceptible to illness from alleged stress at work?

How easy is it for employee to prove breach of duty has been established when he becomes ill and off work allegedly due to a stress related condition for a second time?

Can an employer establish contributory negligence on the part of the employee, when he continued working, even though that work had caused ill health and continued to do so?

Young was an engineer employed by the Post Office. He had worked for a number of years before being promoted to a Manger in 1993. As part of his new job, he had to cope with managing his team, an increased administrative burden and had to cope with the integration of a new computer system. A year later he began to show signs of stress. He saw his GP who prescribed anti depressants. In 1997, he underwent a performance appraisal at work. At which time he refused to extend his duties, stating it would be impossible, given the amount of work he already had. He graphically wrote on the appraisal: "I need some help".

A few months later, things came to a head. He was away from work for 4 months with depression. Whilst off work, his managers visited him at home and it was agreed following him being fit to return to work, he would have a flexible return to the work place, essentially having a gradual return, working very flexible hours, choosing what hours he wished to work and being allowed to go home whenever he liked. He was to be closely monitored and the employer was doing a great deal of handholding.

He returned to work feeling 80 % recovered in his own words. His return to work was short lived, just 7 weeks. In those weeks, whilst some monitoring took place, it was rather on an ad hoc basis. One of the mangers went on holiday, leaving Young to run the department workshop. Young made no complaint however and was not thought to be showing any signs of impending stress or breakdown, until that is, one day he failed to show up for work, and instead a sick note arrived, certifying him unfit to work due to depression.

The Court said:

Mr Young's first absence was not foreseeable. Even his cry for help across his appraisal form, saying, I need help was not enough to put the employer on notice that forseability of harm was imminent.

However by the time he returned to work after his first absence, his vulnerability was all too apparent and the Court found the employers had breached their duty of care towards him whilst the employer was full of good intentions, they were not followed through. It is not up to the employee to be the Judge of what work he could manage.

This was in contrast to Hatton, where some element of self-determination was felt to be reasonable in considering the extent and capacity for hard work.

There was no contributory negligence established. The Courts will be reluctant to fix Claimant's with contributory negligence for concurrent mental illness.

Hatton made no mention of contributory negligence and the Young case is noteworthy for that aspect itself.

Another case of note was Pratley-v-Surrey County Council (2002) EWCH Civ 1067 . The claimant was a worker in a care home for the elderly. The issue arising out of this case was foreseeability of injury. Both the experts in this case agreed she had indeed suffered a stress related illness. The Insured did offer a counselling service, of which the claimant did not avail herself and she had not gone back to see her GP after her initial complaint. When she saw her GP she specifically asked her GP not to record a stress related illness on her sick note as she did not want her employers to think she could not cope. He complied with her request, quoting neuralgia as the reason for her absence.

The only other occasion, the claimant complained was to her supervisor in a passing conversation in the corridor at work, when she indicated she was feeling "stressed" to which her supervisor replied "I am not surprised". The only other indication was at her appraisal, when it was noted her caseload was becoming too heavy again.

The day before the Claimant went on holiday, she told her supervisor she felt she was "going under". They agreed that would look to implement a new system of work on her return from holiday effectively seeking to reduce her caseload. On her return from holiday the new system still had to be implemented and 2 days later she went off work, never to return, with a psychiatric illness.

The Court decided that the Judgment in Hatton was seminal. Whilst the court felt she might have been disappointed that the new system of work was not in place when she returned from holiday, it was not considered she would become mentally ill as a consequence.

Pratley serves to make life difficult for Claimants. Whilst she may have succeeded in establishing foreseeability of injury and medical causation was made out, in the absence of her employers being to be held in breach of statutory duty her claim still failed.

Barber v Somerset County Council House of Lords (2004) UKHL 13; wlr 1089

Following the 4 consolidated cases in Hatton, one of those cases went to the House of Lords where the House overturned the Appeal and restored the original decision of the Trial Judge. Mr Barber had previously brought his claim against his employers alleging that they failed to take reasonable care for his safety. He alleged that his psychiatric injury was foreseeable and his employers ought to have taken precautions against that risk. He was successful in the County Court at first instance. His employer, Somerset County Council in the Court of Appeal, successfully appealed his case. Mr Barber subsequently appealed to the House of Lords where he ultimately succeeded in overturning the Court of Appeal decision. That Appeal was however simply an Appeal on the particular facts of the case and the real issue was whether the Court of Appeal were indeed correct in their approach. Indeed Lord Walker in Barber at paragraph 39 said "Mr Barber did not challenge except in peripheral points and matters of emphasis, the principles of law set out in the Judgment of the Court of Appeal."

Whilst Mr Barber's Appeal succeeded this was without any significant attack on the points of principle set out by the Court of Appeal in Hatton. These have now been effectively approved, with some slight change of emphasis in respect of one or two of them, by the highest judicial authority.

None of the guidelines in Barber were commented on, save, the sixth guideline which reads

"(6)The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisors (Para. 29)."

Lord Walker commented, "This is, I think, useful guidance, but it must be read as that, and not having anything like statutory force."

The advantages of the Court of Appeal judgment given the approval by the House of Lords in Barber is that it reinforces to all a framework for dealing with cases, thereby reducing uncertainty and containing litigation and costs. Doubtless new points to argue will emerge however. Stress claims will still turn very much on their own facts and Hatton and Barber are not judicially idiot proof.