

QBE INSURANCE ISSUES FORUM

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WORK RELATED STRESS: TAKING THE HEADACHE OUT OF UNDERSTANDING THE HSE MANAGEMENT STANDARDS

There is no such thing as a pressure free job. Every job brings its own set of tasks, responsibilities and day-to-day problems, and the pressures and demands these place on us are an unavoidable part of working life. We are, after all, paid to work and to work hard, and to accept the reasonable pressures, which go with that.

Some pressures can, in fact, be a good thing. It is often the tasks and challenges we face at work that provide the structure to our working days, keep us motivated and are the key to a sense of achievement and job satisfaction.

But people's ability to deal with pressure is not limitless. Excessive workplace pressure and the stress to which it can lead can be harmful. They can damage your business's performance and undermine the health of your workforce.

HSE, STRESS AT WORK (1995)

OVERVIEW

The publication of the HSE's 2004 'Management Standards for Tackling Work Related Stress' represents the first attempt to codify best practice in the management of stress risks in the workplace, and opens a new era in preventative stress management. The standards provide a yardstick against which to judge employers' compliance. The HSE's aim is to tackle the causes of work related stress through new goal-setting arrangements.

Whilst no HSE prosecutions have yet been brought in respect of workplace stress, several organisations including the West Dorset NHS Hospital Trust and Coventry City Council have received improvement notices for failing to have stress policies or suitable and sufficient risk assessments in place.

It is likely, however, that the legal community will now seek to deploy the new HSE standards as a template against which to define a 'reasonably safe workplace' – and to establish this as the benchmark against which liability in civil cases would in future be assessed. Should employers then fall short, and their employees' health suffers as a consequence, establishing a civil liability for injury arising would be more straightforward, and statutory enforcement more likely.

STRESS: A DEFINITION

HSE defines stress as 'the adverse reaction people have to excessive pressure or other types of demands placed on them'¹. Pressure in itself is not necessarily bad. It is only when an individual experiences the pressure as excessive that ill health through mental harm can result.

HSE commissioned research has indicated that:

- 500,000 people in the UK may be suffering from stress at a level which is making them ill
- 5,000,000 people in the UK feel either 'very' or 'extremely' stressed by their work
- Stress costs the British economy £3.7 billion each year
- 13.4 million working days were lost in 2001/2002 due to stress, depression or anxiety²

It is also considered that nearly one in five workers believe their job is stressful.

Health and safety management systems have traditionally

focused on 'safety' and 'accident prevention' to the detriment of 'health'. Bringing stress into the equation raises the problem of identifying an essentially intangible injury. Psychiatric ill health is less conspicuous than other forms of illness, and may not be apparent even to an alert employer.

Given this background, is it surprising that increases in civil claims for occupational ill health in respect of workplace stress are forecast?

CIVIL LIABILITY: HATTON APPEALS

The Court of Appeal's decision in the four conjoined appeals in *Hatton v Sutherland and Others* (2002) set a benchmark for civil liability assessment.

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. Two of the claimants were teachers, one a local authority administrative assistant and one a factory worker responsible for receiving deliveries of raw materials. All the defendants appealed.

The Court took the opportunity to review the law and restate matters of principle as they relate to work related stress as follows:

- Ordinary principles of employers' liability apply. There are no special control mechanisms in work related stress
- The question of the appropriate standard of care or the extent of duty owed - known as the threshold question - reflects the actual injury arising from the stress occurrence, and not simply 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. An employer is entitled to assume that the employee can withstand the normal pressures of work, unless the employer knows of a particular vulnerability. However, it is recognised that mental disorder is harder to foresee than physical injury, and an employee for a host of good reasons may not reveal difficulties or illness

“HSE defines stress as ‘the adverse reaction people have to excessive pressure or other types of demands on them’ ”

- No category of employment is more dangerous than others by virtue of job content alone. Work in public service such as social work, the 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 in that it is an individual's perception of the pressures applied by their occupation contrasted with their own view of how they are able to cope
- When considering whether the employer has stepped over the threshold into breach of duty, factors for consideration include:
 - Nature and extent of the workload
 - Intellectual or emotional demands of the job
 - Whether demands are in line with those in comparable jobs
 - Signs that others working in the same environment are suffering from harmful levels of stress
 - Absenteeism levels
 - Individuals' absence records
 - Unusual levels of complaints
 - Signs of harm from stress at work
 - Characteristics of the individual and any history of illness caused by work related stress
- Investigating the background of employees is 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 appropriately
- 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 a relevant context when considering what was reasonable in responding to work related stress. Job transfers, assistance, mentoring, and reallocation of work may be actions 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



HSE MANAGEMENT STANDARDS

The HSE's new standards concentrate on six key stressors, described as risk factors, which are central to the question of whether the employer's chosen risk assessment methodology will be viewed as suitable and sufficient.

An employer's assessment methodology therefore needs to include consideration of:

- **Demand:** employees indicate that they are able to cope with the demands of their job
- **Control:** employees indicate that they have a say in how they do their work
- **Support:** employees indicate that they have received adequate information and support from their colleagues and superiors
- **Relationships:** employees indicate that they are not subjected to unacceptable behaviours (for example, bullying) at work
- **Role:** employees indicate that they understand their role and responsibilities
- **Change:** employees indicate that the organisation engages them frequently when going through organisational changes

The standards are designed to be implemented through a partnership between employers and employees. Employers are encouraged not to rely purely on one source of feedback, but take a broader view and consider information from a variety of sources including focus groups, employee questionnaires, absenteeism information, performance appraisals, and consultation groups. They should put local mechanisms in place to address individuals' concerns within each of the six areas outlined above.

Irrespective of the methodology adopted, employers **must** undertake a risk assessment and implement all appropriate interventions that emerge from this process.

REGULATORY DUTIES

An amendment to the Management of Health and Safety at Work Regulations (MHSWR) in 2003 saw the removal of the civil liability exclusion. Claimants can now cite breaches of the regulations to support a claim for work related stress.

Where it can be shown that an employer has failed to undertake a risk assessment and/or to introduce effective controls, or provide suitable health surveillance, they can now be held to be in breach of this regulatory duty.

Employers **must** therefore comply with their statutory duty to undertake a risk assessment and to introduce effective controls to minimise the risk from work related stress.

BULLYING AND ABUSE

Bullying and abuse covers a wide spectrum from the mildly unpleasant to cases of extreme intimidation or violence.

Whilst claims often involve pressure exerted by managers or supervisors, incidents involving peers are particularly difficult to manage. In such cases, the claimant's strongest argument will be that the employer failed to take reasonable steps to intervene to protect a known victim. Where such a failure is culpable, this establishes a breach of the employer's primary duty.³

“The introduction of the HSE’s ‘Management Standards for Tackling Work Related Stress’ in 2004 introduced minimum standards which employers are expected to follow. This includes implementing a risk assessment and appropriate interventions to tackle the issues uncovered”

PROTECTION FROM HARASSMENT ACT 1997

The Protection from Harassment Act 1997 was enacted to provide a criminal remedy in cases of stalking, specifically where the victim suffered no physical harm. Legislators did not have workplace relationships in mind when framing these provisions. The Act defines harassment broadly as including ‘alarming a person or causing a person distress’.

The 1997 Act prohibits harassment as a course of conduct:

- Which amounts to harassment of another (a circular definition)
- Which the perpetrator knows or ought to know amounts to harassment of another

‘Ought to know’ is defined in terms of whether a reasonable person would think of the conduct as harassment.

The Act requires a person to experience more than one instance of such behaviour for harassment to be proved. Employers have raised concerns that this all-embracing statutory approach could be applied to inter-personal conflicts despite its having been drafted for other purposes.

LEGAL IMPACT OF MAJROWSKI V GUY’S & ST THOMAS’S NHS TRUST

In March 2005 those worries materialised with the Court of Appeal’s decision in *Majrowski v Guy’s & St Thomas’s NHS Trust*. This held that an employer may be vicariously liable under the Protection from Harassment Act 1997 for harassment committed by one of its employees in the course of his or her employment.

The majority decision in *Majrowski* on a preliminary technical point as to whether stress is actionable against employers under the Act takes matters further, confirming that:

- Bullying and harassment in the workplace is conduct captured by the Act
- A manager or supervisor indulging in such conduct is likely to be in the course of employment. Peers may be in the course of their employment, depending on the facts
- The employer may be vicariously liable for injury so caused
- The employer may also be liable if frank injury is not caused but the victim suffers alarm or distress

This decision is being taken to appeal before the House of Lords. In a strong dissenting judgment in the Court of Appeal, Scott-Baker LJ found that imposition of vicarious liability in these circumstances was excessively onerous and did not sit comfortably within the more pragmatic approach enunciated by the same court in *Hatton v Sutherland*. There must be a real prospect that the case will be reversed on appeal.



CONCLUSIONS

LEGAL DEVELOPMENTS

The case of *Hatton v Sutherland* has produced a framework for dealing with work related stress claims. This should benefit all parties by making it clearer where and when an employer has a case to answer.

Changes to the Health and Safety at Work Regulations in 2003 removed the previous civil liability exclusion, meaning that claimants can now cite a breach of the regulations (for example failure to undertake a risk assessment) in support of their allegations. It will be interesting to note the extent to which claimants follow up this previously unavailable route.

Where employers are in breach of statutory duty, claims are clearly likely to be harder to defend. It is imperative now that employers protect themselves against this new point of vulnerability by introducing appropriate risk assessment and control mechanisms into their management system.

HSE'S MANAGEMENT STANDARDS

The introduction of the HSE's 'Management Standards for Tackling Work Related Stress' in 2004 introduced minimum standards which employers are expected to follow. This includes implementing a risk assessment and appropriate interventions to tackle the issues uncovered. These standards have effectively raised the bar in terms of what is expected of a reasonable employer in managing specific stressors in the workplace. Where an employer does not meet these minimum standards, it may be difficult to argue that they are following best practice, further strengthening the claimant's argument against their employer.

The extent to which the civil courts will be influenced by the new management standards (and to which future stress claims become harder to defend as a result) remains to be seen. The one thing employers cannot afford to do is simply wait and see. Instead they should take a board-level commitment to implementing policies that will satisfy HSE requirements.

FURTHER CONSIDERATIONS

Beyond purely legal considerations, there is also a well-established business case for tackling stress in the workplace. Actively managing stress benefits companies' bottom line through increased productivity, lower absenteeism and greater staff retention.

This new era has important implications for health, safety and claims. At QBE, our aim is to provide our business partners with a framework that will enable them to engage positively with the new HSE standards, to get the most out of them from a health and safety perspective, and to avoid the civil liability pitfalls they present for the unwary.

REFERENCES

1. HSE website stress home page at:
<http://www.hse.gov.uk/stress/index.htm>
2. HSE website stress research area at:
<http://www.hse.gov.uk/stress/research.htm>
3. Detailed information on bullying at work and suggested responses available at:
<http://bullyonline.org>

ADDITIONAL INFORMATION

Please download supporting documents, tools and information at:

www.qbeeurope.com/LRM

FEEDBACK

The QBE Insurance Issues Forum has been developed to focus on, and analyse, current topical issues in the field of occupational health, health and safety, risk and insurance management, and human resources.

If you would like to register to receive the QBE Insurance Issues Forum, or know of any others who would like to receive future copies, please email all contact details including name, company and email to the address below.

Should you have any feedback or if there are any specific topic areas you wish us to cover, please do not hesitate to contact us.

issuesforum@qbe-europe.com

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QBE Insurance Group is one of the world's leading international insurers and reinsurers, headquartered in Sydney, Australia. We operate out of 36 countries across the globe, with a presence in all key insurance markets and are lead underwriters within our chosen markets, setting rates and conditions. In 2004, the company underwrote gross written premium totalling A\$8,766m (€ 5,062.4m) and held shareholders' funds of A\$4,420m (€ 2,552.6m).

The Group consists of three geographically focused operational divisions: European Operations, based in London, the Americas, managed from New York, and the Australian Pacific Asia Central European operations - managed from Sydney.

QBE IN EUROPE

QBE European Operations is a leading specialist in London market and European commercial lines business, active in both the Lloyd's market through the managing agent Limit and the company arena through QBE Insurance (Europe).

RECOGNITION

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RATINGS

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For more information on QBE, please visit our website www.QBE.com



QBE Insurance

Corn Exchange, 55 Mark Lane, London EC3R 7NE

T: +44 (0) 20 7456 0000 F: +44 (0) 20 7680 1962

W: enquiries@qbe-europe.com

www.QBE.com