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Stress At Work Claims

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Duties Owed

1. An employer will owe a duty to every employee

1.1. *to provide a safe system of work: Wilsons & Clyde Coal Ltd v English [1938] AC 57;*

1.2. *to provide a reasonably tolerable and safe working environment: Moores v Bude-Stratton Town Council [2001] ICR 271; Nottinghamshire County Council v Perez EAT 951/95;*

1.3. *not to, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties: Malik v Bank of Credit and Commerce International SA [1997] ICR 606; Baldwin v Brighton and Hove City Council [2007] ICR 680; Gogay v Hertfordshire County Council [2000] IRLR 703.*

2. There is no advantage to be gained in relying on breaches of health and safety legislation. See Mullen v Accenture [2010] EWHC 2336; Sayers v Cambridgeshire County Council [2006] EWHC 2029; Easton v B&Q plc [2015] EWHC 880.

Foreseeability

3. This issue is comprehensively addressed in the guidance of the Court of Appeal in Sutherland v Hatton [2002] ICR 613, at paragraph 43:

...the following practical propositions emerge:

(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20).

(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29).

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health (para 24).

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee (para 26). Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health (paras 27 and 28). Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

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(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 not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers (para 29).*

(7) *To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (para 31).*

Breach of Duty

4. See again paragraph 43 of Hatton:

(8) *The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk (para 32).*

(9) *The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para 33).*

(10) *An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this (para 34).*

(11) *An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).*

(12) *If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job (para 34).*

(13) *In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (para 33).*

Loss/Damage

5. See again paragraph 43 of Hatton:

(14) *The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35).*

(15) *Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).*

(16) *The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42).*

The Status of Hatton

6. This guidance is still the starting point in all *"stress at work"* cases, although it has been updated and, in practical effect, amended in some respects.

7. The House of Lords in Barber v Somerset County Council [2004] ICR 457 made it clear that it is no more than helpful guidance, and does not have statutory force. It emphasised that the overall test remains:

"the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weight up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance

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against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

8. The Hatton guidance concerning the relevance of a confidential counselling service seems to have been largely dissolved by the Court of Appeal's decision in Daw v Intel Corporation (UK) Ltd [2007] ICR 1318. There the Court accepted that, workload being the issue, only management intervention could have assisted, and neither the availability of a counselling service nor the employee's failure to use it defeated liability. In Dickins v O2 plc [2009] IRLR 58, the Court of Appeal followed a similar approach.

9. It is, in an extreme/unusual case, possible that the common law duty of care may require an employee to be dismissed for their own welfare: Barber, supra. See also Vahidi v Fairstead House School Ltd [2005] EWCA Civ 765.

10. The guidance is equally applicable if work related stress causes a physical injury, such as ulcers, heart disease or hypertension: Harding v Pub Estate Company Ltd [2005] EWCA Civ 553. And physical injury may lead to mental illness, and if the first is foreseeable, so will be the second: Corr (Administratrix of the Estate of Thomas Corr (deceased)) v IBC Vehicles Ltd [2008] UKHL 13.

11. Information given in confidence by an employee to an employer's occupational health department will not be imputed to that employer: Hartman v South Essex Mental Health & Community Care NJS Trust [2005] EWCA Civ 6 (as opposed to the actual advice given by the adviser to the employer).

12. By way of a further topline summary, in Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1412, the Court of Appeal said at paragraph 119:

(1) In considering, in the context of the common law duty of care, whether it is reasonably foreseeable that the acts or omissions of the employer may cause an employee to suffer a psychiatric injury, such an injury will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some problem or psychological vulnerability on the part of the employee – Hatton.

(2) That approach is not limited to cases of the Hatton type but extends to cases where the employer has committed a one-off act of unfairness such as the imposition of a disciplinary sanction – Croft and Deadman (also Grieves).

(3) However, in neither kind of case should that be regarded as an absolute rule: Hatton contains no more than guidance, and each case must turn on its own facts – Hatton itself, but reinforced by Barber and Hartman.

(4) In claims for breach of the common law duty of care it is immaterial that the duty arises in contract as well as tort: they are in substance treated as covered by tortious rules[8] – Walker, Hatton. In order to establish whether the duty is broken it will be necessary to establish, as above, whether psychiatric injury was reasonably foreseeable; and if that is established no issue as to remoteness can arise when such injury eventuates.

(5) In claims for breach of the Malik duty, or of any other express contractual term, the contractual test of remoteness will be applicable – Deadman.

Working Time Regulations

13. Third, although not actionable in itself outside the scheme of the Regulations, a breach of the Working Time Regulations 1998 may be taken into account in building a case on foreseeability: Hone v Six Continents Retail Ltd [2006] IRLR 49. However, working in excess of the limits in the Regulations does not itself establish foreseeability: Sayers, supra.

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Bullying

14. It is necessary to consider how the Hatton guidance applies to bullying cases. This was considered by Owen J in Green v DB Group Services (UK) Ltd [2006] EWHC 1898, along with the important question of vicarious liability where the perpetrator of the bullying was a colleague of the victim or other third party:

7. The need for foreseeability of injury in this context was emphasised by the Court of Appeal in Garrett v London Borough of Camden [2001] EWCA Civ 395, a case in which the claimant claimed that he had been harassed, intimidated and systematically undermined.

> *"Many, alas, suffer breakdowns and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simple overworking, the tensions of difficult relationships, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. Unless, however, there was a real risk of breakdown which the claimant's employer's ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability." Per Simon Brown LJ at para 63.*

8. There are two limbs to the claimant's claim in negligence. First she contends that her psychiatric injury, and consequential loss and damage, were the result of bullying and harassment on the part of a number of the defendant's employees for whom the defendant is vicariously liable. Secondly she contends that there was a negligent failure on the part of the management and of the defendant's Human Resources (HR) department, to take any or any adequate steps to protect her from such conduct.

9. As to the first, the questions to be determined when considering whether alleged bullying and harassment give rise to a potential liability in negligence were addressed by Gray J. in Barlow v Borough of Broxbourne [2003] EWHC 50 QB His analysis, with which I respectfully agree, and which is directly applicable to this case, is to be found in paragraph 16 of his judgment:

> *(i) "whether the claimant has established that the conduct complained of in the Particulars of Claim took place and, if so, whether it amounted to bullying or harassment in the ordinary connotation of those terms. In addressing this question it is the cumulative effect of the conduct which has to be considered rather than the individual incidents relied on;"*
> *(ii) did the person or persons involved in the victimisation or bullying know, or ought they reasonably to have known, that their conduct might cause the claimant harm;*
> *(iii) could they, by the exercise of reasonable care, have taken steps which would have avoided that harm and*
> *(iv) were their actions so connected with their employment as to render the defendant vicariously responsible for them.*

I would simply add to (ii) that in this case the harm in question is psychiatric illness or injury.

As to the second the questions to be determined are:

> *(i) did the claimant's managers and/or members of the HR department know or ought they reasonably to have known that the claimant was being subjected to the conduct complained of,*
> *(ii) did they know or ought they reasonably to have known that that such conduct might cause the claimant psychiatric injury,*
> *(iii) could they, by the exercise of reasonable care, have taken steps which would have avoided such injury.*

15. It is also instructive to note the comments of Wright J in H v Isle of Wight Council (unreported), 23 February 2001:

"The criterion of what does or does not amount to bullying in any given circumstances is not to be judged solely by the subjective perception of the victim himself…but involved an objective assessment of the observed behaviour, taken in conjunction

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with any apparent vulnerability in the target of the behaviour complained of."

16. In Mullen, supra, it was accepted that there was a fine line between *"strong management"* and *"bullying"*.

Protection from Harassment Act 1997

17. Section 1 of the Protection from Harassment Act 1997 provides that:

"(1) A person must not pursue a course of conduct –

(a) which amounts to harassment of another and

(b) which he knows or ought to know amounts to harassment of the other

…

(2) for the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other".

18. By section 3 a breach of section 1 may be the subject of a claim in civil proceedings, and on such a claim:

"… … damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment".

19. Section 7 provides that:

(2) References to harassing a person including alarming the person or causing the person distress.

(3) A "course of conduct" must involve –

(a) In the case of conduct in relation to a single person … … conduct on at least two occasions in relation to that person.

(b) … …

(4) "Conduct includes speech".

20. The relevant sections of the Act were the subject of the decision of the Court of Appeal in Majrowski v Guy's & St. Thomas' NHS Trust [2005] QB 848. There were two limbs to the decision. First the Court of Appeal held that vicarious liability was not confined to common law claims, and that an employer could be vicariously liable under section 3 of the Act for harassment by an employee in breach of section 1. That limb of the decision was the subject of appeal to the House of Lords [2006] UK HL 34 in which the opinions of the House were given on 12 July 2006. The decision of the Court of Appeal was upheld.

21. The second limb of the decision of the Court of Appeal in Majrowski, which was not the subject of appeal to the House of Lords, was directed to the meaning of harassment within the Act. At paragraph 82 of the judgment May LJ cited the following passage from the judgment of Lord Phillips of Worth Matravers MR in Thomas v News Group Newspapers Ltd [2002] EMLR 78 at paragraph 30:

"The Act does not attempt to define the type of conduct which is capable of constituting harassment. 'Harassment' is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable."

22. May LJ then continued at paragraph 82 of his judgment:

"Thus, in my view, although section 7(2) provides that harassing a person includes causing the person distress, the fact that a person suffers distress is not by itself enough to show that the cause of the distress was harassment. The conduct has also to be calculated, in an objective sense, to cause distress and has to be oppressive and unreasonable. It has to be conduct which the perpetrator knows or ought to know amounts to harassment, and conduct which a reasonable person would think amounted to harassment. What amounts to harassment is, as Lord Phillips said, generally understood. Such general understanding would not lead to a conclusion that all forms of conduct, however reasonable, would amount to harassment simply because they cause distress."

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23. Thus to constitute harassment within the meaning of the Act there must have been conduct:

(a) *occurring on at least two occasions;*

(b) *targeted at the claimant;*

(c) *calculated in an objective sense to cause distress; and*

(d) *which is objectively judged to be oppressive and unreasonable.*

24. It is important to remember that the test for harassment in the Act is the same for both civil and criminal harassment. On any view, this is an important filter on what can be sensibly held to be within the definition, and this was emphasised in Majrowski, and by the Court of Appeal in Conn v Sunderland City Council [2007] EWCA Civ 1492.

25. A very significant advantage to a claim under the Act is that it is not necessary to for the Claimant prove foreseeability of harm, given that this is a statutory tort. There is also a longer limitation period (six years).

26. Finally, but importantly, both the Inner House of the Court of Session and the Court of Appeal have expressed the view that a court does not have to be satisfied that each incident making up that "course of conduct" can be said to have amounted to harassment, only that taken cumulatively the course of conduct itself had that effect: Marinello v City of Edinburgh [2011] IRLR 668 and Iqbal v Dean Manson Solicitors [2011] EWCA Civ 123. This view of the Act was not contended for in Conn (where arguably it may have been relevant), and Conn was not cited in either of these two cases.

Practical Realities

27. There are two key issues to always remember.

28. First, in many cases, the biggest hurdle is the need to establish that the injury was reasonably foreseeable to the employer.

29. Second, and closely related, is that foreseeability must be established early enough in the chronology such that there was still time for the employer to do something (or desist from doing something) to prevent the injury occurring (or deteriorating).

30. In other words, if foreseeability is only established at a time in the chronology when the employee's health has, for all practical purposes, passed the point of no return, then the action will fail. This is because liability must be for damage caused by the failure to act, and the duty to act only arises once there is foreseeability.

31. In many cases, it will be relatively easy to prove that events and experiences at work have caused or contributed to an injury. However, that does not suffice to make out the cause of action, as explained in this document.

32. Finally, it should always be remembered that potential claimants may also have remedies before the Employment Tribunal, such as pursuant to a discrimination (particularly disability discrimination) claim, or an unfair dismissal claim.

RODERICK MOORE

29 November 2016

Biographical Note:

Roderick is briefed by solicitors throughout the UK for advice and representation in Employment disputes and has appeared in a number of significant reported decisions. Over a number of years, the leading legal directories have referred to:

- *him having "a high-profile practice with a particular emphasis on appearing in discrimination cases"*
- *his "outstanding cross examination skills and unflappable demeanour"*
- *his "exceptional grasp of intricate employment issues" and "excellent grasp of the full spectrum of law"*
- *him being "approachable and user-friendly" and having a "down-to-earth and non-stuffy approach"*

He aims to be accessible and responsive at all times.