
MTB
SOLICITORS

Legal & Contractual Routes

- Internal statutory/contractual procedures
- Civil remedies
- Employment law remedies

Overview

- Stress at Work - The principles applicable to stress at work cases have been set out in the case of Hatton v Sutherland (2002) EWCA CAV 76, confirmed by the House of Lords in Barber v Somerset CC (2004) UK HL 13.

- Harassment – acts for which a fellow employee may be liable in tort may constitute acts to which the Protection from Harassment (NI) Order 1997 applies. In this type of case the issue of foreseeability of injury does not apply.

Stress at work principles (i)

- There must be an actual psychiatric injury. Anger, humiliation, upset, embarrassment etc do not amount to an injury. Psychiatric evidence confirming a medical diagnosis is essential.
- The principles for stress at work actions have helpfully been set out at paragraph 43 of the of Hatton v Sutherland Judgement
- The “threshold question” is whether the particular type of harm, i.e. an injury to health, is attributable to stress at work to the particular employee, and was reasonably foreseeable.
- Foreseeability relates to what the employer knew or ought to have known about the employee’s propensity to suffer a psychiatric illness.

Stress at work principles (ii)

- Because of its nature a mental disorder is harder to see than a physical injury. However it may be easier to perceive in an individual with a relevant medical history than in the population at large.
- An employer is usually entitled to assume that an employee can withstand the normal pressures of his job unless he knew of some particular problem or vulnerability.
- The test is the same whatever the employment.

Stress at work principles (iii)

- The factors which have been held to be relevant in answering the threshold question are as follows:

  - The nature and extent of the work done by the employee.
  - Signs from the employee of impending harm to health (However the employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think the contrary).

Stress at work – after foreseeability

- Once it is established that risk of harm is foreseeable one must consider whether the employer has breached the duty of care that is owed to the employee.
- To establish negligence in any employees liability case one must have:
  - (a) A duty of care,
  - (b) breach of that duty of care; and
  - (c) damage resulting from that breach.
- The courts will have regard to the size of the organisation.
- Action required by an employer includes, but is not limited to sabbaticals, transfers to other work, extra assistance, arranging treatment or counselling.

Stress at Work – Duty has its limits (i)

- However, the duty on the employer has its limits as is summarised by Hale LJ at para 34 of Hatton v Sutherland (2002) EWCA CAV 76:

  Moreover, *the employer can only reasonably be expected to take steps which are likely to do some good*. This is a matter on which the court is likely to require expert evidence. In many of these cases it will be very hard to know what would have done some let alone enough good. In some cases the only effective way of safeguarding the employee would be to dismiss or demote him. There may be no other work at the same level of pay which it is reasonable to expect the employer to offer him. *In principle the law should not be saying to an employer that it is his duty to sack an employee who wants to go on working for him for the employer's own good*. As Devlin LJ put it in *Withers v Perry Chain Co Ltd[1961] 1 WLR 1314*, at p 1320,

  "The relationship between employer and employee is not that of schoolmaster and pupil. . . . The employee is free to decide for herself what risks she will run . . . if the common law were otherwise it would be oppressive to the employee by limiting his ability to find work, rather than beneficial to him." Taken to its logical conclusion, of course, this would justify employers in perpetuating the most unsafe practices (not alleged in that case) on the basis that the employee can always leave. But we are not here concerned with physical dangers: we have already rejected the concept of an unsafe occupation for this purpose. If there is no alternative solution, it has to be for the employee to decide whether or not to carry on in the same employment and take the risk of a breakdown in his health or whether to leave that employment and look for work elsewhere before he becomes unemployable.

Stress at Work – Duty has its limits (ii)

- In Vahidi v Fairstead House School Trust Ltd [2005] EWCA Civ 765 a teacher suffered a breakdown as a result of changes at work. Upon return to work the teacher suffered a relapse despite her employer having put in place support mechanisms. The Court of Appeal held that the first breakdown was not foreseeable. The second one was foreseeable but the claimant was unable to satisfy the court that the Employer had failed to take reasonable steps to prevent the relapse.

Stress at Work – causation

- It follows that if breach of the duty of care is established it is still necessary to show that the breach of duty itself caused the harm.
- It is not sufficient to show that occupational stress caused the harm.
- The question that ought to be asked is "whether the psychiatric injuries were caused by inaction in taking preventative measures to address the foreseeable risk of psychiatric injury".
- It is sufficient to show that the breach of the duty of care made a material contribution (Bonnington Castings v Wardlaw [1956] AC 613.

Stress at work - summary

- Stress at work equation:

  - Duty of Care

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  - Foreseeability

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  - Breach of Duty

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  - Causation

Protection from Harassment (NI) Order 1997

- Harassment contrary to the Order is both a criminal offence and a matter which exposes the perpetrator to civil liability.
- A person must not pursue a course of conduct which amounts to harassment of another and which he knows, or ought to know, amounts to harassment of the other.
- Thus, an individual who bullies a fellow employee at work will be liable for doing so (assuming the other conditions of the Act are met). The House of Lords held in Majroski v Guys & St. Thomas's NHS Trust 2007 (1 AC 224) that an employer will be liable vicariously for the statutory tort of its employee in committing the bullying acts.

Protection from Harassment (NI) Order 1997 – Beyond The Trivial (i)

- The fact that the same conduct may be both criminally prosecuted, or give rise to civil trial, means the conduct complained of in a civil action must be capable of amounting to a crime and, thus, must be sufficiently serious in its effects for the public interest to require its proscription. Trivial incidents of behaviour are unlikely therefore to give rise to any liability - a point made forcefully in Conn v. Sutherland City Council (2007) EWCAV 1492. In this case, of the five separate incidents of harassment which had been alleged by the Plaintiff, the Recorder found that only two had been proved. In the first incident, the foreman had asked the Plaintiff and two others to give him the names of those who had left the site early. When they had refused, the foreman had lost his temper and had threatened to smash the window of the portacabin with his fist. He had also threatened to report them to the personnel department. The two other men present stated that they had not been bothered by the foreman's behaviour. In the second incident, the foreman asked the Plaintiff why he was silent. The Plaintiff replied he would only talk to the foreman about work. That led the foreman to lose his temper and threaten to "give him a good hiding", even if it would lead the foreman being dismissed. The Recorded held that the two incidents constituted a course of conduct amounting to harassment for the purpose of the 1997 Act. He found for the Plaintiff. On Appeal by the local authority, the Court held that the two incidents on the facts found by the Recorder could not constitute harassment for the purposes of the 1997 Act. This was because although harassment was left deliberately wide by the Statute, a civil claim could only arise as a remedy for conduct amounting to a breach of Section 1 of the Act, which by Section 2, would also amount to a criminal offence. What constituted the boundary between unattractive and unreasonable conduct, and oppressive and unacceptable conduct, may well depend on the context on which the conduct occurred. The touchstone was whether the conduct was of such gravity as to justify the sanction of criminal law. The first incident did not cross the line between what was acceptable and unattractive, opposed to oppressive and unacceptable conduct. It might have been unpleasant but there was no threat of violence against the Plaintiff, only a threat to damage property. The two other people involved in the incident were not bothered by it. The incident had been well below the line at which criminal sanctions would have been justified. Although the second would have qualified, it could not, on its own, constitute a "course of conduct" within the special meaning given to that by the Act.

Protection from Harassment (NI) Order 1997 – Beyond The Trivial (ii)

- Similarly, in Hammond v INTC Network Services Limited (2007) ALL ER (3) 19(Nov) HHJ Coulson sitting as a Deputy High Court Judge, observed that irritating, annoying and even upsetting conduct will not necessarily be in breach of the 1997 Act.
- The Act prohibits a course of conduct which amounts to harassment of another, and which the harasser knows, or ought to know, amounts to harassment of the other, the tested objective. A person whose course of conduct is in question, ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other. The Act therefore proscribes the pursuit of a course of conduct which causes alarm or distress. A course of conduct involves more acts on more than one occasion.

Harassment – Summary

- Harassment equation:

  - Harassment (Bullying)

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  - Beyond Trivial

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  - Causation

Additional Points (1)

- Office of the Industrial Tribunals and the Fair Employment Tribunal. The Court of Appeal in the case of Vento –v- Chief Constable of West Yorkshire as updated by De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 1 has given guidance on the assessment of damages in discrimination cases.

- - a lower band of £900 to £9,000 (less serious cases);
- - a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and
- - an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.

- Costs

Additional Points (2)

- Article 68 of the Employment Rights (Northern Ireland) Order 1996, provides that employees may not to be subjected to a detriment, such as disciplinary action, in certain cases relating to health and safety concerns.
- Under Article 68(1)(d) an employee who believes themselves to be in serious and imminent danger may leave their workplace or refuse to return to it. The employee's belief in that danger must be both reasonable and genuine. It must therefore be an honestly held belief reached after consideration by the employee of all relevant information.
- There is no limit placed on the meaning of the word 'danger' in Article 68. IN Harvest Press Ltd v McCaffrey [1999} IRLR 778 the EAT held that *"Parliament was likely to have intended those words to cover any danger, however originating."*

Additional Points (3)

- NB: only operates on an individual rights basis (NOT TRADE UNION COLLECTIVE RIGHT - Secretary of State for Justice v Prison Officers Association [2019] EWHC 3553 (QB), [2020] IRLR 196:

- "[Article 68] has nothing to do with inducements to take industrial action. It does not confer any protection on trade unions. Rather, [Article 68(1)(d)] grants protection to employees against suffering detriments for leaving the place of work, and/or refusing to return to work, in the face of a reasonable belief on the part of the employee that s/he is in serious and imminent danger which s/he cannot reasonably have been expected to avert.