STRESS RELIEF

Here is a stress management technique recommended in all the latest psychological texts;

"*Picture yourself near a stream*
Birds are softly chirping in the crisp, cool, mountain air.
No one knows your secret place.
You are in total seclusion from the world.
The soothing sound of a gentle waterfall fills the air with a cascade of serenity.
The water is deep blue and crystal clear.
So clear in fact, you can easily make out the face of your line manager…

There now… feeling better?"

Prior to the current economic downturn the Health and Safety Executive was already warning employers as to the very real problems 'stress' and associated conditions were having upon the nation's workforce. The HSE estimated that 13.5 million work days were lost due to stress in 2008.

The above statistics were compiled before the true bite of the downturn had been felt and before redundancies began to be made and the pressure on an ever increasingly stretched workforce was as keenly felt. Hence, it is anticipated that the corresponding statistic for 2009 will be in excess of the previous year's.

Prior to addressing the legal recourse available to a claimant/employee who claims their employer's actions or omissions have caused a psychiatric reaction, it may be helpful for those representing both claimants and defendants/respondents to note the HSE website, giving valuable guidance to all parties in stress related matters. As a rule of thumb, if an employer complies with, or an employee notes 'breaches' of these guidelines, such matters may well prove persuasive if not determinative. The web address is **http://www.hse.gov.uk/stress/index.htm**.

A claimant may wish to pursue a claim in either the county court or the employment tribunals, depending upon the precise nature of the claimant's allegations. However, it should be noted that if a discrimination claim is brought in the ET and

the discriminatory acts or omissions are the same as those relied upon as the foundation for a personal injury claim, the claimant is obliged to bring her action in the ET. However, depending on the facts, if a discrimination claim has not yet been brought, those advising an employee may wish to examine the county court route instead. In any event, practitioners will no doubt be keenly aware of the cost implications, both pro and against, on either track.

Although this newsletter is targeted towards employment practitioners, this area in particular has many crossovers with which our personal injury colleagues may be able to assist. Therefore, below, I will deal with stress related actions both in the county court and the ET.

PERSONAL INJURY ACTIONS

It is notoriously difficult for a claimant to successfully bring a claim for personal injuries arising out of stress, allegedly caused by the employer's acts or omissions. It is similarly difficult to convince case insurers to act under a conditional fee agreement. The main hurdle in these cases is one of foreseeability. Each and every employer has a duty of care to its employees, enshrined both in statute and common law. However, this duty is not absolute, it is modified by the test of reasonability, i.e. a reasonable duty of care. Therefore, an employer owes its employees a reasonable duty of care to avoid causing injury to that employee by its negligent acts or omissions. It must also be reasonably foreseeable that such acts or omissions would cause injury, whether physical or psychiatric. As stated in *Stokes v GKN (Bolts and Nuts) Ltd* [1968] "*The overall test is still 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 developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it....*"

This is the crux of the problem in stress at work cases. In many work environments employees may report being under pressure, feeling 'stressed' and/or anxious about particular duties or the quantities of duties to be undertaken. However, the case law has been somewhat strict in attributing fault in this regard. For liability to be established the court will require clear evidence that the employer was 'on notice' of the real risk that should duties 'y' continue it will or is likely to cause employee 'x' to suffer from injury. To adopt a line from cinematography, although I accept that it may be over stating the position somewhat, there must be "*a clear and present danger*". Successful cases will, in the main, rely upon a medical report from either occupation health or an independent medical practitioner stating that if the employer continues in the same way, the employee will suffer psychiatric injury.

For those representing claimants in such circumstances the case of *Walker v Northumberland* (1995) seemed to open the floodgates, at least a little, although in reality the courts continued in much the same, restrictive, way. However, the parameters of *Walker* were curtailed in any event by the leading cases of *Sutherland v Hatton* (2002), and subsequently *Barber v Somerset County Council* (2004). The thread that is apparent from all of the above precedent is the issue of foreseeability, that it is not a mere formality.

To counter this generally restrictive approach, in April 2004, the House of Lords said of *Sandwell MBC v Jones* that it was a borderline case but did not interfere with the factual findings of the County Court. In short, the claimant worked excessive hours, effectively doing the work of three people. She asked for help but when it was given, it was immediately diverted by her manager who subsequently dismissed her complaints. She became depressed. During certified sickness leave, she was made redundant. The Court of Appeal upheld the finding of liability on the basis that the employer could have done something to reduce the workload, which would have prevented the psychiatric injury. Ms Jones may consider herself somewhat fortunate in light of the established body of case law.

This area has been revisited in the recent Court of Appeal authority of *Dickins v O2 Plc* (2008). The facts in this case are quite long and intertwined and by summarising them there is a risk that the true reflection of them will be lost. However, with that in mind the case can be summarised thus. The claimant reported to at least two line managers that she was having difficulty coping and even requested a six month sabbatical as she was "stressed out". The employer was also aware of previous stress related episodes and the fact that the claimant was suffering from IBS, potentially stress related. Her line manager began enquiring as to the procedure for taking a sabbatical and offered the claimant the services of the in house counselling. She refused as she was already receiving counselling. The key date in the case was 23rd April 2002, where the claimant made it crystal clear that she was 'at risk'. The representatives of the employer relied heavily upon the offer of the counselling service and the case of *Hatton* as a stress case 'elixir'.

The appeal was dismissed and the finding against O2 was upheld. Therefore, the case of *Dickins* does show that a PI claim founded upon 'stress' is not a hopeless cause as asserted by some commentators. In *Dickins* the employer had verbal evidence from the claimant, medical evidence from various practitioners and knowledge of a history of stress related ailments. A 'clear and present danger',

coupled with a negligent failure to act was present in that case and the court thus found against the employer.

EMPLOYMENT ACTIONS

There is a plethora of potential actions that may be founded upon a psychological reaction to pressures at work. Most fall within a DDA styled claim and therefore will, in most cases, require a finding that the stress illness is a 'disability' under the act. Similarly, if abuse relating to an aspect such a race is found, the psychiatric reaction to such abuse may also be claimable. However, it is not unheard of to base such claims upon a breach of contract, a breach of the implied term that the employer will fulfil its duty of care to each individual employee.

Below, I've set out a number of cases to give a broad impression of the types of actions that have been decided in the ET, one way or the other.

First, *Essa v Laing Ltd* [2004] IRLR 313, CA. The claimant is black and of Somali origin. He is also Welsh. The employer did not take seriously the claimant's grievances centring upon offensive racial comments made to him by a superior. The tribunal awarded £5,000 compensation for injury to feelings but only three weeks' loss of income in respect of depression and inability to find work. This limited award was made on the grounds that the reaction was extreme and irrational and the employer could not be liable for something that was not "reasonably foreseeable." In essence, the employer sought to graft *Hatton* principles onto a discrimination claim. The EAT held that unlike the position in personal injury county court cases, there was no requirement in a race discrimination case for the applicant to show that the type of injury suffered was reasonably foreseeable. The majority held that compensation should cover all harm which arises naturally and directly from the acts alleged.

The next case leads onto a potentially fruitful (for the claimant), or vulnerable (for the respondent) area of stress related disability discrimination. In *Paul v National Probation Service* [2004] IRLR 190, EAT the employer, with the best of intentions, attempted to avoid stress related problems by rejected a job application from the claimant. The claimant had a history of chronic depression, exacerbated by stress. The employer's OH advised that he was not fit to work with people on probation because it was considered 'stressful'. His application was unsuccessful. The EAT said that an OH assessment should not lead to an automatic refusal of employment unless the particular disability affects capability *per se* and any reasonable adjustments would not alter the fact. The OH report failed to take into account any

current psychiatric evaluation, a psychiatrist's report that encouraged him to work; and no suggestion of possible adjustments. The employer was held liable for disability discrimination.

Therefore, imagine a scenario where an employee is certified 'off sick' for stress related ailments, even if such stress was not caused by any negligence of the respondent. If that ailment qualifies or may qualify as a disability under the act the employer may have to be very careful about the way in which it approaches the 'back to work' process. If the employer's requests for information exacerbates the stress ailment by the requests' regularity or content or such otherwise objectively reasonable requests (but modified by the knowledge of the claimant's condition) are a cause of harassment, a claim may be founded upon 3(A)(2)/4(A) – reasonable adjustment, or the relevant harassment provisions.

CONCLUSIONS

With the expected increase in stress related sickness, employment practitioners can also expect a rise in claims based upon that stress. If the warning bells were ringing loud and clear and the employer failed to act, the appropriate forum may well be the county court by way of a personal injury claim.

However, if the stress related action is less clear cut i.e. the psychological reaction may not have been reasonably foreseeable the ET provides numerous avenues to found a stress claim upon. If the psychological reaction is significant so as to qualify as a disability and employer is required to take great care in dealing with their employee. If such care is not taken, action based upon reasonable adjustments, discrimination and/or harassment may be irresistible to the tribunal, even absence any malicious intent.

RICHARD SHEPHERD