Managing Occupational Stress Claims

A Practical Guide

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Understanding occupational stress claims

- Occupational stress claims are difficult for claimants to win
- They can be overwhelming to get to grips with
- Key is to have a clear understanding of the issues that will help you focus your analysis
- Will cover (a) the law and (b) common scenarios one sees in practice

Fundamental principles

- Decision of the Court of Appeal in *Hatton v Sutherland* [2002] EWCA Civ 76; [2002] ICR 613 largely approved by the House of Lords in *Barber v Somerset* [2004] UKHL 13

- 16 Principles set out by Hale LJ (not all still good)

- Although not to be read as though it is a statute, the judgment of Hale LJ in the *Hatton* case provides "*useful signposts for judges faced with the, sometimes complex, facts of stress at work cases*": *Hartman v South Essex NHS Trust* [2005] ICR 782 at para [5].

Fundamental principles

- The ordinary principles of employer's liability apply (*Hatton* para 20)
- 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 (*Hatton* para 22)
- BUT…

Fundamental principles

The courts recognise:

"Stress is a subjective concept: the individual's perception that the pressures placed upon him are greater than he may be able to meet. Adverse reactions to stress are equally individual, ranging from minor physical symptoms to major mental illness."

Hatton para 24

Fundamental principles

"these claims do require particular care in determination, because they give rise to some difficult issues of foreseeability and causation and, we would add, identifying a relevant breach of duty. As Simon Brown LJ pithily put it in Garrett's case, at para 63:

> "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 simply 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 employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability."

KEY POINT

DEVELOPING A PSYCHIATRIC ILLNESS THAT IS CONNECTED WITH WORK IS NOT SUFFICIENT FOR A SUCCESSFUL CLAIM FOR OCCUPATIONAL STRESS

There must be a real risk of breakdown;
That the employer ought reasonably to have foreseen;
And which they ought properly to have averted

(*Garrett v Camden LBC* [2001] EWCA Civ 295 [63])

Key issues

(1) The threshold test: foreseeability

(2) Breach of duty

(3) Causation

Foreseeability

- Foreseeability is the issue on which many occupational stress claims founder. It is the "threshold test". If C cannot establish foreseeability then the claim will fail
- Both parties must keep a laser like focus on it
- In order to do so you need to understand what it is

Foresight of what??

"It is foreseeable injury flowing from the employer's breach of duty that gives rise to the liability. It does not follow that because a claimant suffers stress at work and the employer is in some way in breach of duty in allowing that to occur that the claimant is able to establish a claim in negligence"

per Scott Baker LJ in *Hartman*, paragraph 2

Foreseeability: the test

The test:

whether this kind of harm to this particular employee was reasonably foreseeable (*Hatton* para 23): this has two components:

(a) an injury to health (as distinct from occupational stress);

(b) which is attributable to stress at work (as distinct from other factors) (para 25).

Foreseeability: the test

In *Hatton* Hale LJ identified that a number of factors would be relevant to the question of foreseeability, but in particular:

(a) The nature and extent of the work being done by the employee; and

(b) Signs from the employee of impending harm to health

Foreseeability: the nature & extent of work

- Is the employee under unreasonable pressure?
- Covid?
- Are there high levels of sickness absence?
- There are no occupations which should be regarded as intrinsically dangerous to mental health (*Hatton* para 24).
- BUT *Melville v Home Office* [2005] ICR 782: dangerous / upsetting / traumatic occupations?

Foreseeability: signs from the employee

- Signs of stress are insufficient.
- There is a distinction between “signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health” *(Hatton*).
- See also *Piepenbrock v LSE* [2018] ELR 596

Foreseeability: signs from the employee

What is probably not enough (on its own)?

- Complaints about workload
- Requests for more help with work
- Complaints about interpersonal problems
- Mention of "stress"
- A disciplinary procedure, even involving an act of unfairness (*Yapp v FCO* [2014] EWCA Civ 151; [2015] I.C.R. D13; *Deadman v Bristol CC* [2008] PIQR P2)
- An historic work related stress absence after which C has worked without any apparent difficulties (see *Hatton; Easton v B&Q* [2015] EWHC 880)
- Disclosure of previous depression to OH (*Hartman*)
- Disclosure to employer of counselling (*Hartman*)

Foreseeability: signs from the employee

Evidence that be relevant to foreseeability:

- A recent sickness absence attributed to work where C has not held themselves out as better
- Assertions at work that work is harming health (e.g. complaints of sleeplessness, not eating)
- Erratic behaviour that is out of the ordinary and in the context of unreasonable work demands (eg tearfulness *Hiles v South Glos* [2006] 3418 but see *Sayers v Cambridgeshire* [2007] IRLR 29)
- Relevance of modern understanding of mental health in the workplace / Covid?

Foreseeability: signs from the employee

Hale LJ (again):

"Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job."

"It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder"

"… thinking harder does not necessarily mean he has to make searching or intrusive inquiries."

"Generally he is entitled to take what he is told by or on behalf of the employee at face value" (*Hatton* para 29)

Foresight of what?

What must be foreseeable is not merely a general risk of psychiatric injury in the long term, but a particular risk of injury in particular circumstances and by a particular mechanism:

see *Pratley v Surrey County Council* [2003] EWCA Civ 1067; [2004] ICR 159 at paras 22-25

Foreseeability of risk of psychiatric harm in the future was not enough to put the employer on notice of the risk of a sudden collapse

Foreseeability: managing the evidence

The devil is in the detail:

- No substitute for digging into the detail of the documents
- Look for what is NOT there as well as what is there
- Is there a disconnect between the medical records and the employer's disclosure?

Breach of duty: KEY POINT

This is not the Employment Tribunal!

The question you are concerned with is whether, having been placed on notice of an impending risk of harm to health in the particular employee, the employer has taken proper steps to guard against that risk

It's all about health and safety

Breach: common pleadings issues

"In all cases… 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" (*Hatton* para 33)

Avoid / challenge lazy pleadings.
Claimants: What is the real complaint? Be specific, factual and clear. Defendants: consider Part 18 Request?
Common issues:

- Unparticularised allegations of breach of statutory duty
- Pro forma allegations that do not engage with the facts eg overwork pleaded but the case is about unfair disciplinary
- Vague allegations that do not identify people, events or dates

Breach of duty: more guidance from Hale LJ

- 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).

- 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).

- BUT take care with resources arguments…

Breach of duty: more guidance from Hale LJ

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

Breach of duty: reasonable steps

The steps that should be taken depend very much on the nature of the risk the employer has been placed on notice of. Examples of common steps that might be taken are:

- Prompt referral to occupational health (and following the recommendations!)
- Addressing workload complaints
- Taking steps to deal with interpersonal problems
- Providing an EPA or counselling service (but *Daw v Intel Corp* [2007] All ER 126; *Dickens v O2* [2009] IRLR 58)
- Stress risk assessment BUT *Easton v B&Q* [2015] &*Bailey v Devon Partnership NHS Trust* (2014 – unreported)
- Management support
- Pursuing disciplinary action with reasonable expedition (*Piepenbrock v LSE*)

Breach of duty: unreasonable steps?

What sort of steps might be considered unreasonable for an employer to be expected to take?

- Dismissal (except in extremis; *Barber*)

  NB no claim lies re the manner of dismissal, even wrongful dismissal (*Johnson v Unisys*)
- Abandoning legitimate performance management (*Vahidi v Fairstead School* [2005] E.L.R. 607)
- Abandoning organisational change (*Foumeny v University of Leeds* [2003] ELR 443)
- Steps that place an unreasonable burden on other members of staff (although consider what other supportive measures might have been taken)

Causation

- As crucial as foreseeability
- The claimant must show that that breach of duty has caused or materially contributed to the harm.
- It is not enough to show that occupational stress has caused the harm (*Hatton* para 35)
- "Where there are several different possible causes, as will often be the case with stress related illness of any kind, the claimant may have difficulty proving that the employer's fault was one of them." (*Hatton*)

Causation

- Expert evidence is key
- Expert must be instructed to consider the case in appropriate forensic detail
- Make sure the expert considers closely the allegations of breach of duty, not just whether work generally was a cause
- Apportionment (*BAE Systems v Konczak* [2018] I.C.R. 1 at [70])
- Pre existing disorder or vulnerability.

Conclusions

- Get stuck into the detail
- Don’t forget the legal principles
- Stress or illness caused by work is not enough
- Instruct the right expert and instruct them to do their job properly

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