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**STRESS - EMPLOYERS BEHAVING BADLY?**

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## INTRODUCTION

This whole area has recently been dealt with by the Court of Appeal in the case of Sutherland-v- Hutton (2002) EWCA Civ 76. This case has detailed a series of "propositions" or guidelines which are to be observed by employers in dealing with the issue of stress generally.

Claims by employees for personal injury resulting from stress are a relatively new phenomenon. The landmark case prior to Sutherland was Walker v Northumberland County Council in 1999.

## HOW BIG A PROBLEM?

- A survey by the TQWU in 1997 revealed that 81% of trade union members thought that stress was a "fairly serious" or "very serious" problem for employees in their organisation.
- In 1995, the HSE's "Survey of self-reported work-related illness" estimated that 279,000 people in Britain thought they were suffering for work related stress, anxiety or depression.
- Finally, in 1997 a UMIST survey of members of the Institute of Management revealed that 16% of the managers had taken time of work due to stress in the past 12 months.

## WHAT IS STRESS?

Use of the word 'stress' has become common-place.

- The word 'stress' is sometimes used in a positive context. Small doses of stress may be viewed more as 'challenges' than 'pressure' and can be considered stimulating.
- However we are dealing today with 'stress' in a primarily negative context.

## Definitions

- The Health and Safety Commission's 'Managing stress at work' discussion document defines stress as 'the reaction people have to excessive pressures or other types of demand placed on them'.
- I will be adopting the definition of stress suggested by the Education Service Advisory Committee, which is  
  
"The process which can occur when there is an unresolved mismatch between the perceived pressures of the work situation and an individual's ability to cope".

### DEVELOPMENT OF CASE LAW

- First reported case relating to workplace stress was that of *Gillespie v Commonwealth of Australia* in 1991
- *Johnstone v Bloomsbury Health Authority*, 1991
- *Walker v Northumberland County Council* 1994
- *Sutherland v Hatton*, 2002

### THE RELATIONSHIP BETWEEN STRESS AND PERSONAL INJURY

- In order to make a successful claim for stress-related personal injury it must be shown that the claimant has suffered some form of injury, mental or physical, resulting from the stress.
- The injury can take any form and a claim is made in exactly the same way as one would if one had suffered a fall or been physically injured in the workplace.
- In summary the claim must be for a recognised psychiatric injury.

### THE LAW RELATING TO STANDARDS IN THE WORK PLACE

What must be proven in order to make a successful claim?

- Personal injury claims are made under the law of negligence.
- The employee must establish:
  - a) That the employer owes the employee a 'duty of care',
  - b) That the employer breached that duty,
  - c) That as a result of the breach, the employee suffered loss (in this case the injury)
  - d) That the fact that the breach would result in loss was 'reasonably foreseeable' to the employer.
- Burden of Proof on Employee

#### A) Duty of Care

- In the Sutherland case Lady Justice Hale stated "The existence of a duty of care can be taken for granted".
- Employers' duty of care is also imposed by a number of Statutes and Regulations;

The Health and Safety at Work Act 1974

The Health and Safety Regulations (including the Health and Safety (Consultation with Employees) Regulations 1996)

The Management of Health and Safety at Work Regulations 1999

#### B) Breach of duty

- This is an issue for the court to decide on the basis of the evidence presented.
- Witnesses may be called to give evidence to prove this.
- Employers must be aware that they will not fulfil their duties by delegating them to others.

#### C) Causation

- Employee must establish that the injury / illness resulted from the employer's breach of duty.
- That the injury / illness was caused by the stress is a question of fact.
- The employee must provide medical evidence to establish that the injury / illness was in fact caused by the employer's breach of duty.
- The employee must show that he/she is suffering from a recognised illness (physical or mental).
- If this illness is said to be caused by stress, then that stress must be proven to have been caused by the employer's breach of duty.

- The employee need not show that the stress was the sole cause of the injury, but that it was a material cause.
- This is a question of fact for the court to decide.

#### □) Foreseeability

Recently been addressed by the Court of Appeal in the Sutherland case.

Court held that the question to be asked was:

"whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual concerned. Such a reaction must have two components

(1) an injury to health; which (2) is attributable to stress at work."

Thus the Court held that the answer to foreseeability therefore will

"depend upon the inter-relationship between the particular characteristics of the employee concerned and the particular demands of which the employer casts upon him."

## SUTHERLAND -v- HATTON

Landmark case predominately because of its "propositions" or guidelines. These were as follows:

- 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. The ordinary principles of employer's liability apply.
- The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable. this has two components (a) an injury to health which (b) is attributable to stress at work.
- 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. An employer is usually entitled to assume that the employee can withstand the normal pressure of the job unless he knows of some particular problem or vulnerability.
- The test is the same whatever the employment: there are no occupations which
- should be regarded as intrinsically dangerous to mental health.
- Factors likely to be relevant in answering the threshold question include:
  - (a) the nature and extent of the work done by the employee. 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 by 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: has he a
    - § particular vulnerability or problem? 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?

- 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.
- 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.
- The employer is only in breach of duty if he has failed to take those 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 of and practicability of preventing it, and the justifications for running the risk.
- The size and scope of the employer's operation, its resources and the demand 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.
- 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.
- 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.
- 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.
- 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.
- The Claimant must show that the 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.
- 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.
- 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.

### DAMAGES

- Assessed in accordance with the Judicial Studies Board Guidelines.
- The court will also refer to decisions in previous cases in making its assessment.
- Smith v Manchester awards
- Legal costs
- Damage to reputation

### CLOSING COMMENTS

- Confidential advice service with referral to appropriate counselling or treatment are unlikely to be found to be in breach of duty.
- Unless the employer knows of or ought to have known of a real risk of a breakdown there is no liability.
- An employer is entitled to take what he is told by an employee at face value.
- If an employee complains that he is suffering ill health due to work the employer is likely to be found liable if he does nothing about it.

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