PERSONAL INJURY CLAIMS FOR OCCUPATIONAL STRESS & HARASSMENT

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Section 1.0) Claims for Personal Injury Damages arising from Occupational Stress

1.1 Hatton –v- Sutherland – a landmark judgment.

The leading case is Hatton –v- Sutherland *(2002) 2 AER 1*.

(Also known as Barber –v- Somerset County Council).

The 16 'Hatton Propositions':-

1) The ordinary principles of employers' liability apply.

   There are no special control mechanisms applying to stress claims.

2) The injury to the particular employee must have been reasonably foreseeable.

   An injury to health (rather than knowledge the employee was under pressure) which is attributable to stress at work must be reasonably foreseeable by the employer.

3) An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless they know the employee has some particular problem or vulnerability.

   A mental disorder may be harder to foresee than a physical injury, but may be easier to foresee in a known individual than in the population at large.

4) There are no occupations which should be regarded as intrinsically dangerous to mental health.

   The test of foreseeability is the same whatever the employment.

5) The 'threshold' question.

   (a) Consider the demands of the employee's work:
   - Workload more than normal for that job.
   - Work more emotionally/intellectually demanding for this employee
   - Are the demands unreasonable, compared with others.
   - Others suffering/abnormal levels of absenteeism.

   (b) Signs from the employee:
   - Previous breakdown
   - Uncharacteristic absences
   - Complains or warnings from him or others about stress.

6) The employer is generally entitled to take what the employee tells him at face value.

He does not generally have to make searching enquiries of the employee or seek permission for further information from healthcare providers.

7) It must be plain enough to the reasonable employer to realise they should do something about an impending harm to health.

8) The employer is only in breach if they have failed to take reasonable steps in the circumstances to avoid harm to the employee.

Factors to assess reasonableness include:-

- the gravity of harm that may occur, &
- the costs and practicability of preventing it.

9) The scope and size of the employer's operation is relevant to the test of reasonable steps to take to prevent harm.

E.g. redistribution of duties will be easier in a larger organisation.

10) The employer can only reasonably be expected to take steps which are likely to do some good.

Point for expert advice – e.g. physchiatrist.

11) An employer who offers a confidential advice service (with potential for referral to counseling & treatment) is unlikely to be found in breach of duty.

12) If the only reasonable and effective step to prevent harm was to dismiss the employee, the employer will not be in breach by letting a willing employee continue in his job.

13) In all cases, the employee must identify what steps the employer could and should haven taken to prevent the beach of duty.

14) The employee must show that the breach of duty has caused or materially contributed to the harm suffered.

15) Where the harm has more than one cause, the employer should only pay for that proportion attributable to him, unless the harm is truly indivisible.

16) The damages will take into account any pre-excising disorder of vulnerability that the employee may have succumbed to in any event.

1.2 Is Hatton –v- Sutherland still good law?

Proposition 3 - An employer is usually entitled to assume that the employee can withstand the normal pressures of the job…

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Proposition 6 - The employer is generally entitled to take what the employee tells him at face value.

The **Management and Health and Safety at Work etc. Regulations 1999** came into force after the events leading to the cases in Hatton. Gave rise to civil liability from 2003.

- Requires an assessment of the risks to the employee's mental health and safety of the workload (Regulation 3).
- Requires implementation of adequate preventative or protective measures in relation to the risk of the employee suffering injury associated with an excessive workload (Regulation 4).
- Requires effective planning, organisation, control, monitoring and review of the preventative and protective measures (Regulation 5).
- Requires surveillance of the employee's mental health (Regulation 6).

HSE Guidance: "Managing the causes of work related stress – A step-by-step approach using the Management Standards"

First edition published in 2004. Replacing the first guidance issued in 2001.

Also advocates a positive approach to risk assessment and risk management.
Identifies 6 factors which are potential causes of stress:-

- Demands
- Control
- Support
- Relationships
- Role
- Change

Plethora of other guidance and information on occupational stress: e.g.

- Chartered Institute of Personnel & Development
- NHS
- ACAS
- UNISON

Proposition 11 - An employer who offers a confidential advice service (with potential for referral to counseling & treatment) is unlikely to be found in breach of duty.

Intel –v- Daw [2007] IRLR 346
The employers offered a superb system for sending employees of for treatment. However, the treatment offered could not avoid liability as the damage had already been done.

Example IM Case – **Mrs B**
Referral to OH made. OH made recommendations which were ignored by the employee's line management. Further breakdown resulted.

Proposition 15 - Where the harm has more than one cause, the employer should only pay for that proportion attributable to him, unless the harm is truly indivisible.

Dickins –v- O2 [2008] EWCA Civ 1144
In most if not all cases, if a material contribution to the development of the illness is proved, it is likely that the illness will be said to be indivisible.

Proposition 4 - There are no occupations which should be regarded as intrinsically dangerous to mental health.

The **HSE research** recognises that there is a much higher incidence of occupational stress in certain professions:-

- teaching and research professionals;
- protective service occupation;
- health and social welfare associate professionals;
- corporate managers; and
- public service associate professionals.

The same research also recognises certain industries have a higher incidence stress related absences:-

- public administration and defence;
- education;
- health and social work; and
- financial intermediation.

Proposition 2 - The injury to the particular employee must have been reasonably foreseeable.

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Proposition 7 - It must be plain enough to the reasonable employer to realise they should do something about an impending harm to health.

Dickins –v- O2 [2008] EWCA Civ 1144

- The Claimant suffered with 1 breakdown of illness.
- The Court found she was limited due to her intrinsic capabilities.
- Ms Dickins asked for a different and less stressful job.
- Repeatedly late for work.
- She requested a 6 month sabbatical.
- She was advised of the Defendant's confidential helpline.
- Referral to OH was made but she suffered her breakdown before the consultation.
- Was successful at first instance and on appeal on the basis that her breakdown was reasonably foreseeable to her employers.
- The case recognises the changing landscape of occupational stress-related illness. It confirms that if the breakdown is obvious enough, the Claimant will be able to recover for 1 bout of illness.

1.3 Summary: What an employee needs to prove:-

1. Their employer owed them a duty of care;

2. They suffered a recognised psychiatric disorder;

3. The employee's psychiatric disorder/illness was foreseeable to their employer;

4. The employer was in breach of their duty to the employee in some way; and

5. The employee must show that their employer's breach of duty caused or materially contributed to the psychiatric illness that the employee suffered.

2.0 Harassment Claims.

The claims are brought under the **Protection from Harassment Act 1997**.

The legislation was primarily intended to deal with stalkers.

The act contains provisions for both criminal prosecutions and civil claims.

2.1 What a victim needs to show:-

- There must be conduct which occurs on at least two occasions;
- Which is targeted at the victim;
- Which is calculated in an objective sense to cause alarm or distress;
- Which is objectively judged to be oppressive and unacceptable;
- What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs;
- A line has to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'.

2.2 Majrowski –v- St. Thomas NHS Trust [2006] UKHL 34

- The Claimant was subject to bullying comments from his line manager.
- She was highly critical & abusive of him in front of others.
- Many of the comments were openly homophobic in nature.
- Successful under the Harassment Act.
- (He did not bring his claim in negligence due to concerns over foreseeability and limitation.)
- His employer was held vicariously liable for the acts of his manager.

2.3 More Recent Case Law

Conn –v- Sunderland City Council [2008] IRLR 324

- Conn was a building site worker.
- Alleged two specific acts of harassment.
- Being threatened was an act of harassment but threatening to punch windows out was not.

Ferguson –v- British Gas (2009)

- Mrs Ferguson was pursued for several years by British Gas for monies that they allege were owed.
- She was threatened with debt recovery proceedings.
- She was not a British Gas customer. The computer had been generating the documents in error.
- The Court of Appeal held this constituted harassment.

Dowson & 5 Others –v- Chief Constable of Northumbria Police (2010)

- The Claimants were Police Officers.
- A new line manager was appointed to the serious crime team.
- There were more than 60 allegations of harassment made.
- The judge found that they were not acts of harassment. The line manager's conduct was on occasions more than a clash of personalities but not intended to cause distress.
- In the context of Police Officers dealing with hardened criminals.
- "What might be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa".

3.0) Jurisdiction: Employment Tribunal and/or Personal Injury Claim?

Can an employee bring a claim in the Employment Tribunal then bring a second claim at Court for personal injuries?

3.1) No second civil claim for personal injuries if a claim for discrimination is brought.

A claim for discrimination contains an award for injury to feelings. This is broadly the same 'injury' as is compensated by the personal injury award of general damages for pain, suffering & loss of amenity.

Sherrif –v- Klyne Tuggs (1999) IRLR 481 &
Essa –v- Laing Ltd (2004) I.C.R. 746

3.2) The Claimant may have to elect a jurisdiction to pursue a claim for this element of damages.

This should be determined by the relative strengths of the two claims. It will need close liaison between the Employment and PI teams.

Relevant factors will include:-

- Limitation periods
- Funding
- Merits of the claims themselves.

IM Case – Mrs P

- Claimant brought a claim for unfair dismissal and discrimination based on race, sex and disability.
- Also instructed IM to purse a claim for personal injury damages.
- Employment team advised discrimination claim had merits below 50% and the PI team advised the personal injury claim had merits of 55%-65%.
- Race claim withdrawn, unfair dismissal claim continues. PI claim will be stayed until the UD claim is resolved.

Speakers:

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