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## Recognising and dealing with workplace stress in challenging times

**Stress in the workplace is an increasingly hot topic for HR professionals and managers, even more so in 2009 when individuals are feeling the pressure both financially as well as due to increasing demands at work following wide scale redundancies and cuts in training, recruitment and other areas. It is widely recognised that some stress can have positive effects on performance and productivity. How many times have you lacked the motivation to commence a piece of work until shortly before the deadline and then produced something much better than you would have otherwise produced had you started a week beforehand? However, it is also widely recognised that sustained stress can have a detrimental impact on performance and productivity and in some cases lead to serious psychological and physical conditions.**

**In this paper we examine what stress is, the warning signs, the legal implications and different types of stress claims, as well as steps to minimise stress claims.**

### **What is 'stress'?**

There is no legal or clinical definition of stress. According to the Health and Safety Executive (HSE):

*"Stress is the condition experienced when someone perceives that they are unable to meet the demands placed upon them".*

Stress is, broadly speaking, an adverse reaction to pressures placed upon someone which are perceived to be insurmountable. It is not an illness in itself although it may trigger illnesses such as anxiety and depression, schizophrenia or heart disease, or it may exacerbate pre-existing conditions.

### **Why should employers be concerned?**

The reasons are two-fold. First, stress is one of the leading causes of long term sickness absence and lost productivity.

In our State of HR survey with King's college, respondents reported a 27% increase in stress-related problems among staff during the 12 months prior to November 2008. 18% reported an increase in absence and sickness levels and a further 29% reported an increase in grievances.

According to the HSE, over one third of all new incidents of sickness relate to stress at work and each incident leads to an average of 30 working days lost. Work-related stress in 2009 is costing the economy more than the three-day week and industrial unrest of the 1970's. At the peak of the

unrest in the Seventies, 12.9 million days of output were lost each year. Current levels of stress-related illness lead to a loss of 13.5 million days' output each year.

In addition to loss of productivity and high levels of absence, there is also the spectre of stress claims and the costs associated with defending them. Employees who bring successful claims are compensated for their actual loss. If the employee's psychiatric injury is so severe they will never work again or will never work in an equivalent well-remunerated position, their loss could be substantial. Damages can sometimes be for career loss constituting part or all of the employee's earnings until retirement age. It is no surprise that many awards reach six figures and more.

### **Warning signs of stress**

There are certain behavioural, mental and physical characteristics and symptoms which indicate when an employee is stressed. In terms of behavioural changes, a stressed employee is more likely to miss deadlines, have higher absence levels, lateness issues, have mood swings, rely on stimulants such as caffeine to keep them going and may look dishevelled or unkempt. In terms of physical signs, these can include dry skin, muscle tension and loss of appetite.

Although stress is not a medical condition in itself, it can act as a precursor to a wide range of mental and physical disorders. Mental conditions which can be stress-related include phobias, panic attacks, anxiety disorders, compulsions and addictions (including alcohol and drug abuse), paranoia and depression. Physical conditions which are linked to stress include diabetes (which can occur due to binge-eating or poor diet), high blood pressure and heart disease.

### **Stress Claims**

There are two main causes of stress in the workplace: excessive workload and bullying/harassment. The cause of stress has some bearing on which type of stress claim can be brought.

Since there is no legislation that deals specifically with stress, stress-related legal actions can be brought by employees under the following routes:-

- Claims in Tort (common law negligence/personal injury)
- Claims under statute
  - Protection from Harassment Act 1997
  - Discrimination laws
  - Unfair dismissal under the Employment Rights Act 1996

#### ***1. Common law negligence/personal injury claims***

All employers are under a duty to take reasonable care for the health and safety of employees in the workplace and protect them from foreseeable harm to their physical and mental health. This duty could be breached if an employee is subjected to bullying/harassment at the hands of his or her colleagues or is subjected to an excessive workload.

To prove his or her claim, the employee must show that:

- i. the employer breached the duty of care owed to him/her;
- ii. it was reasonably foreseeable that injury would result from the breach; and
- iii. the employee suffers injury caused by the breach.

Most cases turn on whether or not injury was foreseeable as a result of the breach. Arguably, it is easier to show this with bullying/harassment type claims than with excessive workload claims.

Generally speaking, an injury will be foreseeable if the employer is on notice that the employee is vulnerable (due to, for example, previous bouts of mental ill-health), is not coping with his or her workload or is being bullied or harassed. Otherwise, employers can assume that employees can withstand the normal pressures of the job and need not take any special measures to safeguard their physical and mental health, in excess of what is required under health and safety legislation.

The landmark Court of Appeal case of *Sutherland v Hatton* (2002) determined that employers should only be held liable for occupational stress when they knew, or reasonably ought to have known, that a particular employee is vulnerable to workplace stresses. The Court set out 16 guidelines in respect of such cases. The main guidelines are as follows:-

- The test is the same whatever the employment – there is no occupation which is intrinsically more dangerous to mental health than others.
- Factors pointing to foreseeability include:
  - Abnormal levels of sickness absence within a department.
  - Several employees experiencing high levels of stress within a department.
  - Warning signs from employees (e.g. informal complaints, high levels of absence, breaking down in front of others, missing deadlines, late nights).
- Employers are entitled to take employees' actions at face value. For example if the employee gives a different reason for their absence or if the employee contends that he is able to cope with his workload, the employer can assume this to be correct.
- Once on notice of a potential stress-related illness, the employer must take reasonable remedial steps. Such steps may include redistributing work, allowing sabbaticals or reduced hours or providing mentoring or counselling. That being said, the employer does not have to redistribute work or reduce workload/hours at the expense of other employees. This is something of a balancing act – whilst taking protective measures to safeguard the health and safety of one employee, the employer is not expected to jeopardise the health and safety of another.
- When deciding what remedial steps are reasonable, the Court will take into account the employer's size, resources and demands.
- If the only reasonable and effective step is to dismiss or demote the employee, the employer will not be in breach of its duty by not allowing a willing employee to continue to work. However,

employers need to take care when considering this rather drastic course of action since it could amount to a failure to make reasonable adjustments under the Disability Discrimination Act.

- An employer who offers a confidential counselling service is less likely to be in breach of care although this is not a complete safeguard and it very much depends on the facts. For example, there is no point in having a counselling service if it is not implemented properly or employees are not aware of it (*Harman v South Essex Mental Health & Community Care NHS Trust, 2005*). Furthermore, in some cases counselling would not have made any difference to the employee's stress levels. This may be the case, for example, where the employee cannot cope with the demands of a more challenging role following promotion (*Dickins v O2 PLC, 2008*) or where the employee's problems will only be solved with management intervention (*Daw v Intel Corporation, 2007*).
- When assessing damages for personal injury cases:-
  - An employer should only pay for the part of the loss caused by its breach of duty. This might be relevant where the employee has a stressful home life which may well have contributed to his stress-related injury.
  - Pre-existing disorders or vulnerability should be taken into account and compensation reduced if there is a chance the employee would have suffered a stress-related disorder in any event.

The most well known recent stress-related personal injury claim, perhaps due to the level of compensation awarded, is the case of *Green v Deutsche Bank Group Services (UK) Limited* (2006).

Ms Green was employed by DB Group Services (UK) Limited ("DB") as a Company Secretary Assistant in its secretariat department between 1997 and 2003. Ms Green initially worked in close proximity to four female secretaries who subjected her to a sustained campaign of bullying and torment. The bullying behaviour was relatively benign and childish, such as, ignoring her, refusing to speak to her, excluding her from departmental activities and conversations, making raspberry noises each time she left her desk, bursting into laughter when she left the room and hiding her post, removing her from circulation lists and removing papers from her desk. Ms Green informed a manager about the bullying but was told that she should just try to ignore them and not let them bother her. No action was taken to discipline the bullies or move Ms Green away from them. This was not the first time the bullies had subjected a colleague to such torment – Ms Green was simply the latest victim.

In 2000, Ms Green had a nervous breakdown and was admitted to hospital. She returned to work five months later but suffered a major relapse after being faced with a different type of bullying/harassment at the hands of a male colleague, a Mr Preston. Mr Preston conducted a concerted campaign to advance himself at the expense of Ms Green. For example, he would remove Ms Green's name from documents she had produced and replace it with his own, humiliate her in front of colleagues, talk down to her and generally treat her like a subordinate even though they were at the same level.

She never returned to work. Her job was kept open until 2003 when DB terminated her employment.

Ms Green sued DB for psychiatric injury.

The High Court held that DB had breached its duty of care and that Ms Green's injury had been reasonably foreseeable. Despite the childish and petty nature of the bullying, the Court looked at its cumulative effect. DB knew or ought reasonably to have known the bullying was taking place and did not take reasonable steps to obviate the bullying. DB was also aware that Ms Green was vulnerable since she had disclosed on a pre-employment health questionnaire that she had suffered from depressive illness relatively recently for which she had received drug treatment.

Although DB had paid for counselling and assertiveness training for Ms Green and had required the whole department to attend harassment awareness training, these steps had not been adequate given the size and resources at its disposal.

Ms Green was awarded damages of £800,000 (£35,000 for pain and suffering; £25,000 for her disadvantage in the labour market; £128,000 for lost earnings up to the trial; and £640,000 for her future loss of earnings and pension – it was recognised that Ms Green would no longer be able to work in the City and would experience a significant drop in earnings for the rest of her working life).

## ***2. Statutory Claims***

### **(a) Protection from Harassment Act 1997 (“PHA”)**

The PHA was initially introduced to allow victims of stalkers to be compensated in the courts and imposes civil as well as criminal liabilities. The PHA also has an application in the employment field since it allows employees who have been harassed by a colleague to sue their employer under vicarious liability principles.

A claim under the PHA is perhaps easier to bring than a negligence claim since claimants only need to show that there was a course of conduct (i.e. one or more incidents) which resulted in “anxiety”, “alarm” or “distress”. There is no need to show that the harassment has resulted in psychiatric injury.

An employee has six years from the act complained of in which to bring a claim under the PHA, as opposed to three years for a negligence claim (or three months for a discrimination claim).

Furthermore, the employer is not able to defend an action under the PHA by showing that it took reasonable steps to protect the employee from the harassment. It will be held liable even if it knew nothing of the harassment behaviour and had policies and procedures in place to prevent such behaviour.

Unlike discrimination claims, the claimant does not need to tie the harassment to a protected ground such as sex, age, race, disability or sexual orientation.

Although there are advantages for claimants in bringing a PHA claim, there are also some hurdles. For example, claimants have to show that the harassment took place during working hours. Harassment outside working hours will not be included, unless it is in some way work related, for example, office parties or organised work activities. The cost-sensitive nature of the civil courts is another potential obstacle since the losing party is normally liable for the winning party's legal costs (unlike in the Employment Tribunal) and an unsuccessful claimant may be faced with a legal bill at the end of the trial amounting to tens or even hundreds of thousands of pounds (in addition to their own legal bill!).

In *Conn v Sunderland City Council* (2007) the Court of Appeal made it clear that the harassment had to be serious enough to constitute criminal liability under section 3 of the Act. In that case, Mr Conn, who worked as a paver for the City Council, alleged that he had been harassed and threatened by his foreman. It was clear that the foreman and the claimant did not see eye to eye and that neither party was blameless. The harassment behaviour complained of was that on one occasion the foreman had threatened to punch a window and to bring a group of employees before the personnel department. On another occasion the foreman had lost his temper and threatened to give the claimant a "hiding" after he felt that the claimant had ignored him. The Court of Appeal held that whilst such ill-tempered and boorish behaviour was unpleasant, it was not extreme enough to lead to any criminal liability and therefore the claimant's claim for civil damages was dismissed.

## **(b) Discrimination claims**

### **Harassment claims**

If an employee is bullied or harassed at work and the harassment/bullying is related to a protected ground, he can bring a claim under the relevant discrimination legislation.

"Harassment" is defined as unwanted conduct on a prohibited ground which has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. The "prohibited grounds" are a person's sex, age, race, sexual orientation, disability, gender reassignment, religion or belief.

Conduct will only be regarded as having that effect if viewed objectively (whilst also taking into account the perception of the victim) it should reasonably be considered to have that effect. Therefore, provided any offence caused is unintentional, there will be no claim for harassment if the victim is "hypersensitive".

The definition of harassment has been expanded, at least in the context of disability discrimination, to cover situations whereby a claimant is harassed on account of their association with a person who is covered by a protected ground. In *Coleman v Attridge Law* (2006), the employment tribunal (following an opinion of the ECJ) held that the Disability Discrimination Act ("DDA") could be interpreted as covering harassment based on the claimant's association with a disabled person. Definitions of harassment in other strands of discrimination legislation appear to be capable of an interpretation which includes harassment by association.

Employers have a defence to harassment claims if they are able to show that they took such steps as were reasonably practicable to prevent harassment in their workforce. In deciding this, a tribunal will consider what steps were taken and whether there were other reasonably practicable steps that could have been taken. Reasonable steps would include, for example, having and implementing a dignity at work policy, making all employees aware of the policy and its implications, training managers and supervisors in harassment issues and taking effective steps to deal with complaints, such as appropriate disciplinary action against the harasser.

### **Disability discrimination**

Whilst stress is not an illness *per se*, it can be a trigger for serious illnesses such as depression, heart disease or schizophrenia or it may exacerbate pre-existing physical and mental illnesses. Since stress and illness tend to go hand-in-hand, employers should be alert to the possibility of a stressed employee becoming disabled within the meaning of the DDA.

Assuming that there is a disability capable of protection under the DDA (and it is often safest to do so), it is unlawful to treat the employee less favourably than other employees on account of their particular disability or for a reason related to their disability. Employers are also obliged to make reasonable adjustments where any arrangements made by the employer place the disabled employee at a substantial disadvantage when compared with non-disabled employees. In the context of a stress-related impairment, reasonable adjustments might include reduced working hours or adjustments to working hours (e.g. later start times), redistribution of work, extra supervision, counselling or mentoring. Even if the employee is not disabled under the DDA, it is advisable to make these adjustments in any event so as to reduce the risk of a personal injury claim (see above).

To be liable under the DDA for direct discrimination, disability-related discrimination or a failure to make reasonable adjustments, the employer must have knowledge or constructive knowledge of the employee's disability. Even if the employee has not formally notified the employer of his disability, the employer would be unwise to ignore any warning signs that an employee could be disabled. In *DWP v Hall* (2005), an employer had constructive knowledge of an employee's disability through a series of warning signs including negative replies to questions in a pre-employment health questionnaire, a refusal by the employee to allow the employer access to her medical records, an application for disability tax credit, the employee's volatile behaviour and the fact that one of the interview panel had known of her prior to the interview.

### **(c) Unfair dismissal claims**

An employer faced with an employee having stress related problems may contemplate dismissal but as ever care needs to be taken to avoid a finding of unfair dismissal. In stress-related cases, the potentially fair reason for dismissal will be either 'conduct' or 'capability', depending on the circumstances. For example, if the employee is persistently late for work or has unusually high levels of absence, the potentially fair reason for dismissal may be 'conduct'. If the employee is on long-term sickness leave, or under-performing the dismissal will be a 'capability' dismissal.

It is relatively easy for the two to become blurred. For example, it is not unusual for an employee who is being disciplined to suddenly go on long-term sick leave. Where this is the case, the employer should make sure that the reason for dismissal is consistent with the reason for the initial investigation or for considering disciplinary action. Alternatively, the employer can commence a new investigation and procedure from scratch, for example, where the employee's conduct is not a sufficient reason to dismiss but his capability is.

Before dismissing an employee for capability reasons, it is advisable to obtain a medical prognosis to determine for example if there is a reasonable prospect of the employee returning to work, or any problems that are contributing to under-performance being put right, and whether any reasonable adjustments should be made (in case the employee is disabled). Where the employee is claiming permanent health insurance, he will usually lose the benefit if his employment is terminated. Unless the employment contract contains a provision allowing the employer to terminate in these circumstances, the employer may be liable to compensate the employee for all future PHI payments that he would have otherwise received up to the normal retirement age.

An employer can fairly dismiss an employee who is on long-term sick leave, even where the employer caused the illness. In *Royal Bank of Scotland v McAdie* (2006), an employer fairly dismissed the employee for reason of her incapability even though it had caused the stress-related illness which had led to her long-term sickness absence. The Tribunal recognised that an employer is not required to keep an employee on the books indefinitely when there is no reasonable prospect of them ever returning to work, even where it had caused the illness complained of. However, in these circumstances, the employer is required to "go the extra mile" before dismissing the employee. For example, it would be expected to go to extra lengths to find alternative employment for the employee, tolerate a longer period of absence than it would normally tolerate or allow a longer period of contractual sick pay. That said, a tribunal is unlikely to be well disposed towards an employer who has dismissed for an illness it caused and the employer will have its work cut out in defending an unfair dismissal in these circumstances.

### **Practical steps to minimise stress claims**

The following are examples of ways in which an employer can reduce the risk of stress claims:-

- The use of return to work interviews and appraisals to identify stress-related reasons for absence or poor performance.
- The use of employee questionnaires to identify stress "hot spots" within the organisation.
- Training for managers on identifying stress symptoms and on managing stress in the workplace.
- Introduce a stress policy.
- Providing a confidential employee assistance programme (EAP) and/or independent counselling services. Employers are advised to check with their insurers since EAPs are sometimes provided as part of their insurance policies.

- Ensure an even distribution of work and appropriate delegation of duties. This can be achieved by way of regular group meetings, the use of utilisation surveys and/or monitoring weekly timesheets.
- Be vigilant to signs of stress amongst workers. A sudden change in behaviour or appearance can be a strong indicator of a stressed employee.
- The use of pre-employment health questionnaires or regular medicals to identify vulnerabilities.

## Contact

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## Events programme

Speechly Bircham and Kings College London ran a series of learning events from February to July 2009, based on the key trends and issues that emerged from our joint survey 'Riding the recession'.

To find out more about the events programme and to download the survey report "Riding the recession? The State of HR in the economic downturn", please visit [http://www.speechlys.com/Employment\\_training\\_programme](http://www.speechlys.com/Employment_training_programme)

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