ALL STRESSED OUT?

Handling Workplace Stress Claims

APIL Occupational Health SIG Seminar

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Laura Elfield

Chambers of Grahame Aldous QC

9 Gough Square, London

EC4A 3DG

DX: LDE 439

Tel: 020 7832 0500

Fax: 020 7353 1344

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HANDLING WORKPLACE STRESS CLAIMS

1. The HSE has defined "stress" as the adverse reaction people have to excessive pressures or types of demands placed on them.

2. It is a reaction, not an illness in itself. Its effects are shown in psychological conditions, such as anxiety or depression, and physical health problems, such as heart disease. Recovery for "stress" is therefore an aspect of personal injury – whether psychological or physical. This paper focuses on the recovery for psychological injury caused by stress at work.

3. When faced with a "stress at work" claim, significant work can be involved at the initial stages, in order to determine whether a case has merits. In addition, early decisions have to be made as to whether the appropriate forum is the employment tribunal, the civil courts or both.

4. The possible causes of action raised by a stress at work claim are as follows:

   a. Breach of the employer's duty of care at common law and/or under the Six Pack Regulations;

   b. A claim under the Protection from Harassment Act 1997;

   c. Breach of contract – the implied duty of trust and confidence;

   d. Discrimination - where psychological injury is caused by or is the subject of discrimination.

5. This paper will focus primarily on civil claims and those under the Protection from Harassment Act 1997. Save for the jurisdictional issues, claims in the employment tribunal are outside the scope of today's seminar.

DUTY OF CARE AT COMMON LAW

6. Claims for psychiatric injury at work are governed by the same rules at common law as other claims for injury at work. All employers have a duty to take reasonable care for the safety of their employees. That the claim might involve stress at work involves the ordinary principles of employer's liability law: see ***Petch v. Commissioners of Customs & Excise*** [1993] ICR 789.

7. The duty to take care is to take care of the employee's physical as well as mental health. There is no distinction in principle between a physical as opposed to a psychiatric injury. In practice however the evidence required to establish that the duty was breached in a psychiatric injury cases is often much more difficult compared to cases concerning physical injury.

8. The leading case on the general principles to be applied in claims for psychiatric injury arising out of stress at work remains ***Sutherland v Hatton*** (2002) EWCA Cov 76, CA. The 16 point check-list set out by Hale LJ has been approved and applied more recently by the House of Lords in ***Barber v Somerset*** [2004] UKHL 13 and the Court of Appeal in ***Hartman v South Essex Mental Health & Community Care NHS Trust*** [2005] EWCA Civ 06.

9. The following practical propositions were set out as guidance:

    i. There were no special control mechanisms applying to claims for psychiatric illness arising from the stress of doing the work the employee was required to do. The ordinary principles of employers' liability applied;

    ii. The threshold question was whether this kind of harm to this particular employee was reasonably foreseeable ie an injury to health which was attributable to stress at work;

iii. Foreseeability depended upon what the employer knew or ought reasonably to have known. An employer was usually entitled to assume that an employee could withstand the normal pressures of the job unless she knew of some particular problem or vulnerability;

iv. The test was the same whatever the employment;

v. Factors likely to be relevant were the nature and the extent of the work done by the employee and signs from the employee of impending harm to health;

vi. The employer was generally entitled to take what she was told by an employee at face value;

vii. To trigger a duty to take steps, the indications of impending harm to health arising from stress at work ought to be plain enough for any reasonable employer to realise that she should do something about it;

viii. The employer was only in breach of duty if she failed to take the steps that were reasonable in the circumstances;

ix. The size and scope of the employer's operation, its resources and the demands it faced were relevant when deciding what was reasonable;

x. An employer could only be expected to take steps that were likely to do some good: a court was likely to need expert evidence on this;

xi. An employer who offered a confidential advice service with referral to appropriate counselling or treatment services was unlikely to be found in breach of duty;

xii. If the only reasonable and effective step would have been to dismiss or demote the employee, the employer would not be in breach of duty to allow a willing employee to continue in the job;

xiii. In all cases it was necessary to find the steps the employer both could and should have taken before finding her in breach of duty;

xiv. The claimant had to show that breach of duty had caused or materially contributed to the harm suffered. It was not enough to show that occupational stress had caused the harm;

xv. Where the harm suffered had more than one cause, the employer should only pay for that proportion of the harm suffered that was attributable to her wrongdoing unless the harm was truly indivisible;

xvi. The assessment of damages would 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.

10. The guidance in ***Hatton*** has been generally accepted and followed in cases involving work-related stress but the guidance does not have the force of statute and there have been some notable departures: in particular in ***Dickins v O2 Plc*** [2008] EWCA Civ 1144 and ***Daw v Intel Corporation*** [2007] ICR 1318, CA which are considered in further detail below.

FORESEEABILITY

11. The key issue in stress at work claims is usually foreseeability. The extent to which an employer ought to have foreseen that an employee was going to

suffer a breakdown or psychiatric injury through stress at work is often very limited where there is no herald or obvious warning of the impending mental injury. General albeit intense stress at work is unlikely, on its own, to be enough to establish that the employer ought to have foreseen the damage and taken steps to avoid it. Simon Brown LJ said of such claimants in ***Garrett v. Camden LB*** [2001] EWCA Civ 395, CA:

> *"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 simple overworking, the tension 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"*

12. In the wake of ***Hatton*** the Court of Appeal was quick to ensure that the threshold for foreseeability was set high. In ***Bonser v RJB Mining*** [2003] EWCA Civ 1296, CA Mrs Bonser worked for RJB Mining as a Technical Support and Training Manager from 1995 until she suffered a nervous breakdown in April 1997. From about mid-1996, Mrs Bonser was subjected to an ever increasing workload by an over-bearing superior. The key finding was that, by August 1996, it was reasonably foreseeable that if her superior continued to behave as he was, "somebody is going to crack. If steps had been taken in August 1996 to remedy matters in the workplace, then she would not have had her nervous breakdown in April 1997". The judge at first instance awarded her damages on the basis of a one year acceleration of her psychiatric disorder.

The Court of Appeal over-turned the decision. With reference again to ***Hatton,*** the Court of Appeal emphasised that foreseeability of stress was not enough - it must be foreseen by the employer that illness would follow. As Simon Brown LJ put it:

"Overwork of itself is likely to lead to stress. It is altogether less likely to lead to the breakdown of the stressed employee's health. For that to be foreseen, the claimant will generally need to establish, not only that the employers knew that he or she was being overworked, but, in addition, one or other of the following circumstances: either (i) that the employers knew that the individual employee was, for some reason, particularly vulnerable to stress induced illness; or (ii) that the claimant was manifesting clear signs of some impending harm to health before eventually illness followed.".

13. In ***Pratley v Surrey County Council*** [2003] EWCA Civ 1067, Miss Pratley worked for Surrey CC as a care manager from 1994 until September 1996 when she suffered a nervous breakdown due to stress at work.

In March 1996 Miss Pratley mentioned to her superior, Mrs Elrick, in what was found to be a light-hearted exchange in the corridor, that she was suffering from stress, to which Mrs Elrick responded that she was "not surprised". In an appraisal signed in June 1996, but relating to the period to March 1996, Mrs Elrick noted that the volume of Miss Pratley's cases was "becoming too great again". The key event however was a routine supervision meeting in August 1996 when Mrs Elrick recorded that Miss Pratley felt that she was "going under" and feared "repercussions on her personal health as a result of pressures.". Miss Pratley's main concern was her fear that several new cases were being transferred to her and, in the meeting, Mrs Elrick assured her that a system of "stacking" would be introduced to reduce the pressure.

Miss Pratley then went away on three weeks' annual leave. Upon her return in September, she suffered an immediate nervous breakdown upon discovering that the system of stacking had not in fact been introduced.

The Court of Appeal held the defendant not liable. It was accepted that the failure to implement the system of stacking was causative of the claimant's nervous breakdown but she failed on the issue of foreseeability. It was held that the risk actually foreseen was the risk of a breakdown at some future stage

if the workload was not reduced. The risk of immediate collapse arising out of the failure to implement the stacking system was not foreseeable. This was the case, even where Mrs Elrick accepted that it would not have been unreasonable for the claimant to expect the system of "stacking" to be implemented on her return.

Ward LJ, giving the minority decision, found against the claimant but on a different basis. He found that it was reasonably foreseeable - and indeed actually foreseen - that there was a risk of future psychiatric harm if the workload was not reorganised. As the real risk of the claimant suffering immediate psychiatric harm was however small, it was not reasonable to expect the defendant to take steps to eliminate that risk by introducing the stacking system in time for the claimant's return to work.

14. For a case where an employee succeeded in establishing foreseeability see ***Hone v Six Continents Retail Ltd*** [2005] EWCA Civ 922, CA where it was found that there were, on the evidence, sufficiently plain indications of impending harm to the health of the employee who had been working excessively long hours (approximately 90 hours per week).

Mr Hone started working for the defendant as a licensed house manager at their Moat House Inn in Luton from August 1999, having worked at previous pubs for the defendant for about four years. He complained that his workload was excessive and that this eventually caused him to suffer psychiatric injury. He visited his GP complaining of headaches and insomnia in mid-May 2000 and on the 28th May 2000 collapsed at work with giddiness and chest pain. The defendant did not know of his previous visit to the GP.

The question for the court was whether injury to health was reasonably foreseeable. The Court of Appeal, upholding the decision of the judge at first instance, held that it was. The defendant was aware that the claimant was working long hours and had been complaining from early in his employment that he was without an assistant manager. In April 2000, two key employees left which increased the pressure on the claimant. From the end of March 2000

to the end of May 2000, the claimant was submitting time sheets showing he was working in excess of 90 hours per week. The crucial trigger was a meeting in mid-April 2000. The meeting was requested by management as the claimant was refusing to opt in or out of the Working Time Regulations 1998 because of "lack of management support.". At the meeting the claimant specifically complained of his long working hours and that he was tired. The defendant appeared to accept at this meeting that an assistant manager was required. None was provided by the time of the claimant's collapse. It was held that after the meeting in April 2000 an injury to the claimant's health was reasonably foreseeable.

Interestingly, neither the defendant nor the Court were convinced that the claimant was working the hours claimed. The Court found that the fact that the claimant was making such claims indicated either that he was working hours greatly in excess of anything that could reasonably have been expected of him, week after week, or that such irrational entries indicated a cry for help.

One of the significant factors in the case was the breach of the Working Time Regulations. The Court stated that the plain and obvious purpose of the Regulations is to protect the welfare and health of employees. The defendant was aware of the Regulations and their purpose and the claimant was refusing to sign the opt out.

15. In ***Dickins v O2 Plc*** [2008] EWCA Civ 1144, CA the claimant had been employed for several years. She was promoted in 2000 to a position for which she did not have the necessary qualifications. Although appropriate training and support was promised, it was not provided. The claimant soon became exhausted and "at the end of her tether.". In November 2000, she had a minor crisis at work when she could not cope with an audit, burst into tears and had to go home. She was off for two days. In her annual review in March 2001, her managers noted that the audit had been a "bridge too far" and had "taken its toll on her.". She started to suffer symptoms of IBS in 2001 and was off work from time to time. She was moved to a different job and her employer was aware, at the time, that she was undergoing counselling and believed her

IBS to be stress-related. Notwithstanding the move, she had to undertake the 2002 audit alone and had to work very long hours. In March 2002, she spoke to her manager about the possibility of moving to a different, less stressful job. She said that the volume of work was too much and that she needed help. She did not mention anything about the state of her health. She was told there were no vacancies and was asked to wait three months. She continued at work, was late nearly every day as she was exhausted. In April 2002, she told her manager that she wanted six months off, that she was "stressed out", that she was struggling to get out of bed in the mornings and she did not know how long she could carry on before being off sick. She was told about the employer's counselling service but she was already receiving counselling. At her annual appraisal in May 2002, she repeated the request for time off and said that she was still feeling very stressed. It was agreed that she would be referred to occupational health. This was not processed in time and the claimant went off sick in or about June 2002 and did not return to work thereafter.

It was found that the employer was on notice of impending harm to health only from the meeting in April 2002. The other prior incidents went only to background. At the meeting in April 2002, the judge found that the claimant was "palpably under extreme stress" and "about to crack up" so that the threshold was reached. The claimant succeeded as the employer failed to take steps and in particular failed to process or action the referral to occupational health in time.

OCCUPATIONAL HEALTH/COUNSELLING SERVICE

16. Hale LJ said in ***Hatton*** that 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. Where the employee is seen by her employer's occupational health department or a counsellor provided by or paid for by the employer and the employee discloses evidence that she is vulnerable to psychiatric injury or has indeed suffered it in the past the employer cannot be fixed with that knowledge if the information is provided confidentially by

the employee (see ***Hartman v. South Essex Mental Health & Community Care NHS Trust*** [2005] EWCA Civ 06).

17. However, in a case which concerns complaints and overwork, as many such claims do, is it the case that provision of a counselling service acts as a panacea and extinguishes the employer's duty of care as implied in Hatton? Each case must be considered on its own facts and where an employee can show that a counselling service is unlikely to have had any impact on her workload and the serious management failings, the failure to take action remained that of the employer. So held the Court of Appeal in ***Intel Incorporation (UK) Limited v. Daw*** [2007] EWCA Civ 70. Pill LJ said

> *"the consequences of that failure are not avoided by the provision of counsellors who might have brought home to management that action was required. On the judge's findings the managers knew it was required."*

18. In ***Dickins v O2*** the employer's offering of a confidential advice service was also not considered sufficient to discharge its duty – in particular where the employee was already receiving counselling.

DEMOTION/LEAVE THE JOB

19. In ***Hatton***, Hale LJ said 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.

20. Yet in ***Daw*** above the Court of Appeal appeared to distance itself from this proposition. The employee in ***Daw*** was a hard-working, loyal, payroll administrator for a large company. Her managers knew that there were serious management failings which led to her being overworked and that they should have enquired further into her complaints and that if they had done so they would also have become aware that there was a connection between the way she was feeling and her previous postnatal depressions (of which they were

aware). Her employers in fact persuaded her to stay in the job on the assurance, which was not fulfilled, that assistance would be provided. Pill LJ said of the allegation that she should have decided then to leave:

"The fact that the respondent did not give up her job when the stresses grew did not, in present circumstances, eliminate the duty of care owed to her. It is not a rule of law that an employee who does not resign when stresses at work are becoming excessive necessarily loses a right of action against her employer."

SIX PACK REGULATIONS

21. The Six Pack Regulations may, in appropriate cases, assist in a stress at work claim. In practice, the most often pleaded Regulations are the Management of Health and Safety at Work Regulations 1999 – in particular Regulations 3(1)(a) (duty to carry out a risk assessment), Regulation 6 (duty to provide health surveillance) and 10 (duty to provide information about the risks identified by the assessment).

22. In 2001, the HSE published some basic guidance entitled: "Tackling Work-Related Stress", to assist in the process of risk assessment. This guidance has evolved to become the "Management Standards" approach to helping employers to manage the causes of work-related stress. The Management Standards do not have legal force but are to assist employers in complying with their legal duties. They are available on the HSE website. The courts have not yet considered the Management Standards in any reported case.

23. Note that, even where there has been a breach of the requirement to carry out a risk assessment under the Regulations this will not automatically lead to liability. In ***Mullen v Accenture Services Limited*** [2010] EWHC 2336, QB the point was re-iterated by Judge Harvey Clark QC that there still had to be foreseeability on the part of the employer in respect of the particular illness suffered by the employee.

WORKING TIME REGULATIONS 1998

24. A question of breach of the Working Time Regulations often arises in cases involving excessive hours and over-work.

25. Arguments that there should be direct liability for psychiatric injury under the Regulations have been rejected or avoided by the courts: see ***Sayers v. Cambridgeshire Country Council*** [2006] EWHC 2029, QB as have arguments that failure to comply with the Regulations amounts to a breach of the employer's duty of trust and confidence: see ***Hone v Six Continents Retail***.

26. In ***Packenham-Walsh v Connell Residential*** [2006] EWCA Civ 90, CA, the Claimant complained of having to work excessive hours without breaks or proper support and had taken no summer holiday. The Court of Appeal considered that, although the Defendant's failure to keep records in accordance with the Working Time Regulations and apparent lack of awareness of the consequences of the Regulations provided a *"favourable background"* against which to assess whether or not there had been a breach of duty at common law, they did not in themselves establish a breach. All the facts had to be considered in assessing whether the injury was reasonably foreseeable.

PROTECTION FROM HARASSMENT ACT 1997

27. The Protection from Harassment Act 1997 came into force on 6th July 1997. It provides for criminal and civil liability for harassment. In the wake of ***Majrowski v Guy's & St Thomas's NHS Trust*** [2006] UKHL 34 it was thought that the Act might substantially assist victims of workplace stress where the injury is the result of bullying or other oppressive conduct by colleagues or managers and which amounts to harassment as defined by the Act.

28. A significant feature of claims under the Act is that there is no requirement to establish foreseeability of the injury or loss suffered by the Claimant. In ***Samantha Jones (1) v Rachel Lovegrove (2) v Liam Patrick Ruth (1) Karen Lesley Patricia Ruth (2)*** [2011] EWCA Civ 804, the Court of Appeal have confirmed this. Patten LJ, giving the leading judgment, stated:

"Conduct of the kind described in Section 1 is actionable under Section 3 in respect of anxiety or injury caused by the harassment and any financial loss resulting from the harassment. There is nothing in the statutory language to import an additional requirement of foreseeability. Nor is the foreseeability of damage the gist of the tort. Section 1 is concerned with deliberate conduct of a kind which the defendant knows or ought to know will amount to harassment of the claimant. Once that is proved the defendant is responsible in damages for the injury and loss which flow from that conduct. There is nothing in the nature of the cause of action which calls for further qualification in order to give effect to the obvious policy objectives of the statute.".

29. A sometimes forgotten point is that, even if an employee is unable to establish harassment as defined by the Act, if within limitation there may well still a claim at common law for bullying: see ***Green v DB Group Services (UK) Limited*** [2006] EWHC 1898, QB. The claim can be put on the basis of vicarious liability and/or for the failure of the employer to take adequate steps to protect from the bullying. Here, issues of foreseeability remain key although, if bullying is established on the facts, it is difficult to see that an employee will fail on this issue.

MAJROWSKI V. GUY'S AND ST THOMAS'S NHS TRUST [2006] UKHL 34

30. Mr Majrowski was employed as an audit coordinator. He was subject to bullying and harassment by his manager in that she was rude and abusive to him in front of other staff, she was excessively critical of his time-keeping and his work. She set unrealistic performance targets for him and threatened him

with disciplinary action if he failed to meet them. She sent him to Coventry. He said she did this because he was gay.

31. The House of Lords found that the Protection from Harassment Act 1997 did create a statutory tort for which an employer could be held vicariously liable where an employee, acting in the course of his employment, commits a breach of a statutory obligation sounding in damages.

32. Note that at paragraphs 31 to 39 Lord Nicholls expressly decided that the employer's defence in a sex discrimination claim that the employer took such steps as were reasonably practicable to prevent the employee from doing the culpable act (1) is not available to an employer who is liable for the tort of harassment which the Act creates, and (2) the fact that the employer's defence is not available is not a reason why an employer should not be liable for the statutory tort.

LIMITATION

33. The limitation period is 6 years under the Act. Section 7 provides:

> *"6. In section 11 of the Limitation Act 1980 (special time limit for actions in respect of personal injuries), after subsection (1) there is inserted- "(1A) This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997."*

34. There is no section 33 discretion however. The period runs from the date of the loss and not from the date of the harassment.

DEFINITION OF HARASSMENT

35. The Act provides little assistance in the definition of harassment. Essentially it is a "jury" question or question of fact. Section 7 of the Act provides there must be at least two occasions on which the conduct complained of is alleged to have occurred for there to be a finding of "course of conduct". As to what is harassment, section 1(2) provides:

"For the purposes of this section, the person whose conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

36. Lord Nicholls in Majrowski attempted to assuage the concerns of employers who feared unfounded complaints under the Act. He said at paragraph 30:

"Where the claim meets [the requirement of the "close connection" test], and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2."

37. Initially, the courts focussed on the reference to misconduct being: "of an order which would sustain criminal liability under section 2". In particular, the Court of Appeal in ***Conn v Sunderland*** imposed a high standard indeed for conduct amounting to harassment within the Act.

38. In ***Conn*** it was alleged that, on two proven occasions, the Claimant's site foreman Mr Dryden had abused, threatened and intimidated the Claimant in such a way as to amount to harassment within the meaning of the Act. The first incident in October 2000, involved Mr Dryden becoming angry and threatening to "punch out the windows of the cabin" and have the Claimant and his colleagues "up before the personnel department". Mr Conn's colleagues however stated that they had not been afraid of Mr Dryden or even particularly bothered. The second incident took place in November 2000. Mr Dryden lost his temper and said that he would "give Mr Conn a good hiding and didn't care if he lost his job over it.". Apparently Mr

Dryden was so angry that he was shaking with rage and Mr Conn felt scared and threatened.

39. In the Court of Appeal, Lord Gage, giving the leading judgment found that, *"although the matter was not free from doubt",* he was prepared to accept that the second incident fell within the Act – the conduct crossed the line to oppressive and unacceptable conduct and clearly caused the Claimant a great deal of distress. However, the first incident, while unpleasant, did not fall within the Act. No physical threat had been made – it referred solely to property (the window); the remarks were directed to three people and not just Mr Conn – he was not targeted; and further, that his colleagues had not been troubled by the remarks. In the recorder's judgment, he also held that the Claimant himself had not felt threatened until the second incident. Therefore: *"in my judgment, this is the sort of bad-tempered conduct which, although unpleasant, comes well below the line of that which justifies a criminal sanction."*. There was only one incident so no course of conduct.

40. Lord Justice Ward stated, in agreement, that: *"I am tempted to only to add: what on earth is the world coming to if conduct of the kind that occurred in the ... [first] .. incident can be thought to be an act of harassment, potentially liable to giving rise to criminal proceedings punishable with imprisonment for a term not exceeding six months, and to a claim for damages for anxiety and financial loss? ... The conduct here does not come close to harassment* ….".

41. In a series of more recent cases, however, the Court of Appeal has resiled from what appears to now be the high-water-mark of ***Conn***. In ***Allen v London Borough of Southwark*** [2008] EWCA Civ 1478 and ***Ferguson v British Gas*** [2009] EWCA Civ 46, both non-employment cases, the Court of Appeal focused instead on whether or not conduct was *"oppressive and unacceptable"* rather than *"merely unattractive, unreasonable or regrettable"* and these have been followed in the employment context by the Court of Appeal in ***Veakins v Kier Islington Limited*** [2009] EWCA Civ 1288.

42. In ***Veakins***, the claimant had worked for the employer for two years before going on sick leave with depression. She complained that, over about a three month period before going off on sick leave, she had been subjected to harassment by her supervisor, Jackie Lavy. The complaints – which were upheld in full at first instance – were of an embarrassing "telling off" in front of others; of being picked on and singled out for no reason; of being required to sign in and out every day; of being told to "fuck off" on one occasion, although the claimant accepted that such language was not unusual in her office; and of Jackie Lavy ripping up, in front of the claimant, a complaint that the claimant had written about her.

43. The Recorder, at first instance, rejected the claim on the basis that the conduct was: *"a very long way away from anything that, in a sensible criminal regime, would lead to a prosecution, much less to a conviction"*. The Court of Appeal said that this was the wrong approach. They found the account of *"victimisation, demoralisation and the reduction of a substantially reasonable and unusually robust woman to a state of clinical depression"* self-evidently crossed the line into behaviour that was *"oppressive and unreasonable"*. It may be that a prosecutor would be reluctant to prosecute but they found that, the proven conduct would be sufficient to establish criminal liability. The presence of malice or otherwise was not necessary but obviously made the "oppressive and unacceptable" test easier to achieve. In the present case, it was easily satisfied.

44. The Court of Appeal did state that Mrs Lavy's conduct was *"extraordinary"* and cautioned that it did not expect many workplace claims to give rise to such liability: *"It is far more likely that, in the great majority of cases, the remedy for high-handed or discriminatory misconduct by or on behalf of an employer will be more fittingly in the Employment Tribunal*".

45. In the recent case of ***Donna Rayment v MOD*** [2010] EWCA 281, QB, the High Court followed ***Veakins*** and found that a course of conduct which had the sole purpose of getting rid of an employee could amount to harassment within the meaning of the Act.

46. In ***Iqbal v Dean Manson Solicitors*** [2011] EWCA Civ 123, the Court of Appeal held that three letters, sent by a firm of solicitors to an ex-employee, which arguably amounted to a deliberate attack on X's professional and personal integrity, in an attempt to dissuade him from acting for a particular client, arguably evidenced a campaign of harassment against X.

DAMAGES

47. In ***Hugh Martins v Choudhary*** [2007] EWCA Civ 1379, the Court of Appeal considered damages in a case involving assault and the tort of harassment outside of the employment context. While not separating the assault from the harassment in terms of damages, the Court of Appeal appeared to accept that an award for injury to feelings might be made, applying the ***"Vento"*** bracket, in addition to an award for psychiatric injury, where appropriate.

48. At first instance, in ***Mark Lyon v Ministry of Defence*** LTL 13/9/11 (decision of Recorder Potts at Leicester CC), where the Claimant brought proceedings at common law for personal injury and under the Protection from Harassment Act, the Court declined to make a separate award for anxiety under the Act when the Claimant had already been awarded general damages for pain, suffering and loss of amenity in the PI claim in which her anxiety had been taken into account.

TRUST & CONFIDENCE

49. While ***Hatton*** type claims tend to be based on breach of the duty to provide a safe workplace, there is a developing body of case law based on the implied duty of trust and confidence. The meaning of the term remains as defined in ***Mahmood v BCCI*** [1997] ICR 606, namely that it is a term that:

"the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.".

50. The claim is for breach of contract. The issue of forseeability is therefore different than ***Hatton*** type claims. The Court of Appeal in ***Deadman v Bristol City Council*** [2007] EWCA Civ 822, a case on psychiatric harm allegedly caused by breach of the implied duty of trust & confidence, recently approved the following passage from Chitty on Contracts 29th ed para. 26-047 (para. 45):

"A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach.".

51. In ***Deadman,*** Mr Deadman had been accused by a colleague of sexual harassment. The Council failed to follow certain of the procedural requirements of its harassment policy in dealing with Mr Deadman. In particular, only two rather than three members of staff were convened to consider the complaint. Mr Deadman had the decision set aside but was then informed that a new panel would be convened to deal with the matter again. Mr Deadman complained that the employer handled the matter insensitively in notifying him of this decision by leaving a letter on his desk.

52. The Court of Appeal held that there was no implied term that the employer would investigate complaints of harassment sensitively but there was a term that it would follow its published procedure in the investigation of any complaints of harassment made against him. The implied duty of trust and confidence included dealing with personal disputes and difficulties between employees in a way that was conducive to their individual well being and the well being of the employer's enterprise, so far as reasonably possible.

53. While the employer had been in breach of contract in convening a panel of only two: *"If one had asked either of the parties at that time [the procedure was incorporated into the contract] whether they thought it at all likely that an error of that kind … would result in psychiatric harm to one or other of those involved, I think they would have been astonished."* (para. 46).

54. The case was also put as a breach of the duty of care in tort. As the duty was in itself bound up with forseeability, this failed.

55. In reality, such a claim will only assist in civil claims in relation to pre-termination breaches. This is because of the effect of ***Johnson v Unisys*** [2001] 2 WLR 1076. Here, the Claimant claimed damages for a mental breakdown allegedly caused by his wrongful summary dismissal for gross misconduct. Breach of the implied term was relied upon. The House of Lords decided that there could be no common law claim for psychiatric harm arising out of the manner of dismissal. Where the unfairness occurred in the course of a dismissal, the only available remedy was a tribunal claim for unfair dismissal.

56. This was in contrast to the position in ***Gogay v Hertfordshire CC*** [2000] IRLR 703, where a social worker was suspended on allegations of sexual abuse without reasonable or proper cause and told of the allegations and suspension in a letter. She was not dismissed and brought a claim in the civil courts for the resulting psychiatric injury. The Court of Appeal held that where the employee was subject to an unfair disciplinary procedure and suspension but was not dismissed, she could recover damages in the civil courts for the resulting psychiatric injury. In upholding her claim, the Court of Appeal distinguished the situation from ***Johnson v Unisys*** as it was said that suspension rather than dismissal manifestly contemplated the continuation of the employment relationship.

57. The matter of where to draw the line between a pre-termination breach and the dismissal itself was considered by the House of Lords in the conjoined appeals of ***Eastwood v Magnox Electric*** plc and ***McCabe v Cornwall County Council*** [2004] UKHL 35. Suffice to say that the position remains complex and unsatisfactory. Lord Nicholls suggested that the entire situation merited urgent attention by the government and the legislature. To date, this has not occurred!

58. The importance of establishing whether injury was caused by pre- or post-termination breaches was highlighted in ***GAB Robins (UK) Limited v Gillian***

Triggs [2008] EWCA Civ 17. Here, the Court of Appeal considered the position where the employee's ill health occurred before the date of constructive dismissal. Ms Triggs worked as a secretary for the Respondent's chartered loss adjustors business from September 1999. From about 2001, the Claimant was overworked to the extent that she suffered stress and collapsed at home in about 2003. She was also subjected to bullying by one of her managers. In September 2004, the Claimant returned from more sick leave to receive a bullying telephone call from the manager. She left that morning, never to return to work. She was signed off with anxiety and depression. During her time off sick, Ms Triggs took out a grievance against the company, which was not adequately dealt with and in particular the complaint against her manager not taken seriously enough. While on sick leave, her pay was reduced to half pay and then to statutory sick pay. Finally, on the 15th February 2005, Ms Triggs wrote to the company stating that, bearing in mind the employer's response to her grievance, she had no option but to terminate her contract and seek compensation for constructive dismissal.

59. Ms Triggs brought a successful claim in the employment tribunal for constructive unfair dismissal. She did not bring a civil claim. In the employment tribunal, upheld by the EAT, directions were given for assessing her damages on the basis of loss of earnings in full for a period to be determined by the tribunal. The Court of Appeal held that this was the wrong approach. A distinction had to be drawn between loss flowing from the dismissal itself, which was exclusively the province of a claim for unfair dismissal; and loss flowing from the employer's antecedent breaches of the implied term as to trust and confidence, which could only form part of a common law claim. Ms Triggs' reduced earnings capacity by reason of her illness was not a loss suffered by her in consequence of the dismissal but was loss that flowed exclusively from the employer's antecedent breaches, which had been committed before the dismissal and so was recoverable, if at all, only by way of a common law claim. It was right that the dismissal was constructive so that it was the result of, and followed upon, her acceptance of the employer's antecedent breaches of the implied term of trust and confidence (which in turn had caused her illness) but it was fallacious to suggest that those

antecedent breaches constituted the dismissal. The dismissal was effected purely and simply by her decision that she wished to discontinue her employment. In her claim for unfair dismissal, she could only claim compensation for whatever loss flowed from that dismissal.

DISCRIMINATION

60. There are currently six prohibited heads of discrimination – sex, race, disability, age, religion and sexuality. All are governed by statute and include protection against harassment on the specified ground. The test is much lower than for harassment under the Protection from Harassment Act. It is not possible to bring a claim for discrimination per se in the civil courts – although it may form part of the background – eg in ***Majrowski*** it was thought that the motivation for the harassment was Mr Majrowski's sexuality. Equally, a claim for non-discriminatory bullying cannot be brought in the employment tribunal unless it forms part of the course of conduct leading to a constructive dismissal.

61. Where there is overlap – eg the ***Majrowski*** situation – there are various factors to consider:

a. There are much stricter time limits in the employment tribunal – three months from the date of the act complained of or the last act complained of where there has been a course of harassing conduct, date of the last act. The ability to extend time by presenting a grievance no longer applies to claims, broadly, post-dating October 2009. A Tribunal may allow claims out of time where just & equitable (in discrimination claims) or where not reasonably practicable to present a claim in time (in unfair dismissal claims);

b. The general rule remains that no costs are recoverable in the employment tribunal;

c. Rules of evidence still remain more relaxed in the employment tribunal although increasingly orders in relation to disclosure/witness statements etc resemble civil court directions;

d. Employment tribunals, in particular in harassment claims proper, may well be more familiar with and therefore possibly more sympathetic to the issues. As set out above, the test for harassment in any event is much lower in discrimination claims;

e. Claims for psychiatric harm caused by discrimination are not subject to the requirement of foreseeability: merely of causation: ***Essa v Laing Limited*** [2003] IRLR 346, EAT. An applicant is entitled to compensation where they can show a direct causal link between the act of discrimination and their loss;

f. A claimant can recover, in addition, for injury to feelings in the employment tribunal.

62. In terms of stress and disability, where stress causes a person to suffer from a physical or mental impairment which falls within the definition of disability in the Equality Act – namely an "impairment which has a substantial and long-term adverse impact on his or her ability to carry out normal day-to-day activities", then it is unlawful for an employer to discriminate against the employee on ground of or for a reason related to that disability and further the employer may have a duty to make reasonable adjustments in relation to employment. These might include eg altering working hours or providing supervision or support or permitting flexible working. If your employee might fall within the definition, talk to the employment department to make an early decision as to how the case should be progressed.

COMPROMISE, ESTOPPEL & ABUSE OF PROCESS

63. If dual claims are running or anticipated, care must be taken about the wording of any compromise agreement in the employment tribunal proceedings. In

particular, the words: “In full and final settlement of all claims arising out of or in the course of employment”, entered into as part of the employment compromise, are likely to prevent any PI claim being brought or continued, unless clear wording is used to preserve the position.

64. If a claimant with dual claims attempts to have the same issues litigated in both forums, matters of estoppel and/or abuse of process can arise. Indeed, if a claimant should have put forward all claims in, for example, the employment tribunal, the claimant can be barred from then seeking to make a claim in the civil courts.

65. In ***Sheriff v Klyne Tugs (Lowestoft) Limited*** [1999] ICR 1170, CA, an employee allegedly suffered a nervous breakdown through racial harassment, abuse and bullying by the master of the vessel. He went off work and was then dismissed. He made an application to the employment tribunal under the then Race Relations Act, which was settled for £4,000. It was a term of the compromise that it was in full and final settlement of all claims which he had or might have had “arising out of his employment or the termination thereof being claims in respect of which an Industrial Tribunal has jurisdiction”. The claimant did not bring a claim for personal injury in his race discrimination claim and could have done. He then sought to bring a County Court claim for psychiatric injury, alleging negligence against his employer. The allegations were based on the same facts as relied on in the Tribunal claim. The County Court claim was struck out. The Court of Appeal gave three reasons why this was the correct decision:

a. The Employment Tribunal had exclusive jurisdiction in respect of the statutory tort of racial discrimination in the employment context and a claim for racial discrimination included personal injury damages;
b. The claim was precluded by the compromise agreement;
c. Public policy precluded the re-litigation of the same issues in the two claims (res judicata under ***Henderson v Henderson***).

66. If a claimant, having started a claim in the employment tribunal, decides to withdraw it, the better to bring the claim in civil proceedings, care needs to be taken as to the manner of withdrawal. In short, an order for dismissal upon withdrawal needs to be avoided as this has been held to be a judicial decision sufficient to create an issue estoppel so as to prevent a civil claim being brought: see ***Lennon v Birmingham City Council*** LTL 27th March 2001, CA; ***Ako v Rothschild Asset Management Limited*** [2002] IRLR 348. Under the ET Rules in force since 2004 (Rule 25) however, if the claim is merely withdrawn without dismissal upon withdrawal, in essence no estoppel arises: see ***Verdin v Harrods*** [2006] IRLR 339.

PRACTICAL TIPS

67. When faced with the above minefields, the savvy practitioner would be well advised to take the following steps at an early stage:

a. Obtain a full and detailed statement from the client at an early stage. The chronology will be crucial – as will consistency and credibility;

b. Obtain medical, personnel & occupational health records early. Ask the client when symptoms were first mentioned to the employer and what was said about them;

c. Obtain early medical reports. Often such cases can be lengthy and expensive to run but may involve limited damages – in particular where there is a previous history, other causal factors and/or the duty on the employer was only triggered after the initial injury – eg for failing properly to manage a return to work.

d. If the claimant has had or is likely to have employment terminated or is suffering from a disability, be alive to the issues of overlapping jurisdictions. Make sure that both the employment and personal injury departments are involved from the outset in order properly to determine strategies for running the case;

e. Be and remain aware of the tight time limits for bringing claims in the employment tribunal and of the effect of compromising or discontinuing any employment claim;

f. Organise an early conference with counsel!

Laura Elfield
9 Gough Square
lelfield@9goughsquare.co.uk