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An Assessment of Employer Liability for Workplace Stress

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Relevance of the Study

Since Karasek's landmark paper was published in 1979, stress in the work environment has received considerable attention in a wide variety of academic literature as being a significant issue for employers, workers, and society at large (Karasek, 1979; Siegrist, 1985; Johnson & Hall, 1988; McCaig & Harrington, 1998; Smith, 2001; de Lange et al, 2008). Research from cross-sectional (Broadbent, 1985; Estry-Behar, et al., 1990; Bromet, Dew, Parkinson, Cohen, Schwartz, 1992) and longitudinal studies (Kawakami, Haratani, Araki, 1992; Netterstrøm, et al, 2008) have found that high levels of psychological demand, including a fast work pace and a large number of conflicting demands, and the combination of high job demand and low control at work so-called 'job strain' are predictive of common mental disorders, such as largely mild to moderate depression and anxiety disorders (Rugulies, Bultmann, Aust, Burr, 2006; Stansfeld & Candy, 2006; Virtanen, Honkonen, Kivimaki, 2007). Researchers have reported on the negative consequences associated with workplace stress, both for individuals and organisations (Cooper & Marshall, 1976). It has been recognized that employers have a duty, which is in many cases enforceable by law, to ensure that employees do not become ill (Michie, 2002, p. 68). The aim of this article is to analyse the legal record on litigation since 1992 and discuss how the findings inform the wider literature.

Introduction

Stress is the psychological and physical state that arises when the resources of the individual are not sufficient to cope with the demands and pressures of the situation (Michie, 2002). Stress can manifest itself in different forms and is particularly reflected in changes in mood and behaviour. Acute responses to stress may be emotional; for example, they include anxiety, depression, irritability, social isolation, and fatigue (Michie, 2002). There is evidence that workplace stress can cause a wide range of psychological and work-related harm, including diminished work performance, lower job satisfaction, absenteeism, career interruptions, job loss, depression, health problems, and even contribute to an increased risk of coronary heart disease (Kivimaki et al., 2012). Workplace stress is defined by the Health and Safety Executive as “a harmful reaction people have to undue pressure and demands placed on them at work. The number of cases reported in 2011/2012 was 428,000 representing 40% of work related illnesses” (HSE 2013, page 2). The latest estimates from the Labour Force Survey show (www.hse.gov.uk/statistics/causdis/stress/). The total number of cases of work-related stress, depression or anxiety in 2013/14 was 487 000 cases (39%) out of a total of 1 241 000 cases for all work-related illnesses.

Michie’s (2002) research into psychological ill health and associated absenteeism in the workplace identified five associated key factors: (a) long hours worked, work overload, and pressure; (b) interactions between work and home stress; (c) lack of control over work and lack of participation in decision making; (d) poor social support; and (e) unclear management and work roles and poor management style. However, while the literature referred to above (Karasek, 1979; Siegrist, 1985; Johnson & Hall, 1988; McCaig & Harrington, 1998; Smith 2001; de Lange, Taris, Kompier, Houtman, Bongers, 2008; Broadbent, 1985; Estryin-Behar et

al., 1990; Bromet, Dew, Parkinson, Cohen, Schwartz, 1992; Kawakami, Haratani, Araki, 1992; Rugulies, Bültmann, Aust, Burr 2007; Netterstrøm, Conrad, Bech, Fink, Olsen, Rugulies, Stansfeld 2008) provides a comprehensive discussion of the forms workplace stress might take and the organisational dynamics that give rise to such stress, there has been a dearth of literature discussing the legal claims made relating to workplace stress in the organisational context.

This research will identify the most prominent categories of workplace stress resulting in legal action, the lessons for litigants in terms of the success or failure of legal action, the consequences of the outcomes of legal proceedings for the respective parties, and provide information on the organisational contexts giving rise to workplace stress litigation. This article examines case law relating to workplace stress and the information provided on the flow of interpretive case law will no doubt capture the attention of human resources professionals who need to be aware of potential legal liability in this domain. In this respect, this work will make an important contribution to the existing literature. Understanding and monitoring case law can help HR professionals reduce the amount of potentially divisive litigation their organisations face and help prevent workplace stress caused by the work environment. In this context, legal analysis and management strategies can combine to produce an organisational response to dealing with stress in the workplace. Workplace stress claims have been described as the ‘next growth area’ in claims for psychiatric illness (Mullany & Handford, 1997; Elvin, 2008; Horsey & Rackley, 2009). Hugh Collins stated “owing to the limitations of the statutory compensatory scheme in the UK ... private law has been used to expand the range of protection against illness ... in the workplace” (Collins, 2003:238). To understand how court decisions are changing, we need to trace the development of this body of law (Ivancevich et al., 1985).

Legal Context

Traditionally, English law exhibited a strong reluctance to hold employers liable in terms of negligence related to workplace stress. Ostensibly, this reluctance was founded on the difficulties in identifying psychological harm and on concerns regarding creating too wide an ambit of liability. The latter issue has become a popular focus in the media as claims have been made that we live in an increasingly “blame and sue society.” Reputedly, organisations have become less innovative, scarce resources are unproductively diverted, and unnecessary and costly precautions are taken to avoid litigation (Williams, 2006). The fact there may be no objective proof to support the idea that we live in an increasingly “blame and sue” society is beside the point when a firm belief to the contrary has taken hold in the collective consciousness. Consequently, many employers *believe* themselves to be at an increased risk of being unfairly sued, despite the *actual* likelihood of being the target of litigation for workplace stress being low (Williams, 2006).

A series of cases since 1995 has provided guidance in this area as to when liability might arise. The judiciary has started to expand the boundaries of the employer’s duties towards the employee’s health and safety. Extreme work-based pressures and excessive workloads led to the introduction of a general duty to protect the health and safety of the employee, as explained in *Johnstone v. Bloomsbury Health Authority* (1992).

However, identifying the potential causes of psychological injury and ascertaining the potential legal responsibility for such harm is a far from easy task. Indeed, the Court of Appeal in *Hartman v. South Essex Mental Health Trust* (2005) stated that the courts are still finding it difficult to apply the appropriate principles of law to stress claims. As Baker L.J. observed in (*Hartman*), no two cases are the same, therefore consideration needs to be given to the particular facts of each case and care needs to be taken in the application of the general principles.

In *Walker v. Northumberland County Council* (1995) damages were awarded for a psychiatric injury caused by the employer's negligence. The claimant was employed as a social services manager with a significant workload. He was also responsible for dealing with emotionally demanding child abuse cases. The claimant suffered two episodes of mental illness linked to his work environment. Following the first bout of mental illness he was assured of additional support but this was not forthcoming. The court held that the employer was aware of Walker's vulnerability and had failed to provide help; thus Walker's second breakdown was reasonably foreseeable. Colman J stated: "Where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of stress, the employer was under a duty of care to provide a safe system of work, not to cause the employee psychiatric harm by reason of the volume or character of the work the employee was required to perform."

In *Ingram v. Worcester County Council* (2000) an out-of-court settlement was reached when it became clear that the employer had failed to take reasonable care of the employee and was likely to lose the case. The employee concerned had suffered severe and lengthy periods of stress in the workplace and had also been undermined by senior management. The claimant received a settlement of £203 000.

Cases such as *Walker* and *Ingram* caused some employers concern at the degree of their potential liability should they fail to deal with workplace stress cases in an appropriate manner.

The law in this area was considered further by the Court of Appeal in *Hatton v. Sutherland* (2002). This case dealt with four joined appeals on stress related illnesses at work. Two claims involved teachers. One concerned a local authority administrator and another a factory worker. All were claiming that they had been forced to stop working because of stress related psychiatric illnesses caused by their employers. In order to be successful in a

workplace stress case, the claimant must establish the essential elements of a negligence action, which are: i) duty of care; ii) breach of duty; iii) causation and foreseeability. Hale LJ set out the law in this area when issuing the judgment of the court in *Hatton* at paragraph 43. The law, as stated by Hale LJ, is set out below.

Duty

It was emphasised that 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 (para. 22, *Hatton*). The ordinary principles of employer liability apply (para. 20, above). The threshold question is whether the kind of harm done to this particular employee was reasonably foreseeable, not whether psychiatric injury was foreseeable in a person of ordinary fortitude (para. 23, above). This has two components: (a) an injury to health (as distinct from occupational stress) which is (b) attributable to stress at work (as distinct from other factors) (para. 25 above). In relation to foreseeability, the court stated that it depends upon what the employer knows (or ought reasonably to know) about the individual employee. An employer is usually entitled to assume that the employee can withstand the normal pressures of a job unless he or she knows of some particular problem or vulnerability (para. 29, above). The test is the same no matter what employment: there are no occupations that should be regarded as intrinsically dangerous to mental health (para. 24, above).

Factors likely to be relevant in answering the threshold question include the nature and extent of the work done by the employee (para. 26, above). For example, is the workload much heavier than what is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are the demands being made of this employee unreasonable when compared with the demands made of others in the same job

or in a comparable job? Is there an abnormal level of sickness or absenteeism in the same job or the same department? Other factors relate to signs from the employee of impending harm to health (para. 27, above). For example, has he or she demonstrated a particular problem or vulnerability? Has he or she already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged uncharacteristic absences? The employer is generally entitled to take what he is told by his employee at face value, unless he has a valid reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further probing of the employee's medical advisers. To establish a duty to take further steps, the employee's indications of impending harm to their health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (see [31] above).

Breach

In relation to the question of breach of duty, the Court developed several propositions to help determine the issue of breach (Barrett, 2002). First, the employer is only in breach of duty if he or she has failed to take steps reasonable to the circumstances, bearing in mind the magnitude of the risk, the gravity of the harm which may occur, the costs and practicability of preventing harm, and the justification for running the risk (para. 32, above). Second, the size and scope of the employer's operation, its resources, and the demands it faces are relevant in deciding what is reasonable. These include the interests of other employees and the need to treat them fairly, for example, in any redistribution of their duties (para. 33, above). Third, an employer can only reasonably be expected to take steps that are likely to do some good, for example, allowing the person to work from home, and the court will likely require expert testimony to support this (para. 34, above). Fourth, 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 (paras. 17 and 33). Fifth, 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 the work (para. 34, above). Sixth, in all cases, it is necessary to identify the steps which the employer both could and should have taken before finding him or her in breach of his or her duty of care (para. 33, above).

Causation and Foreseeability

The claimant must show that breach of duty has either caused or materially contributed to the harm suffered as it is not enough to demonstrate that occupational stress caused the harm (para. 35, above). The assessment of damages will take into account any pre-existing disorder or vulnerability and consider the likelihood that the claimant would have succumbed to a stress-related disorder in any event (para. 42). Thus, using the language of Simon Brown LJ in *Garrett v. Camden London Borough Council* (2011), there must be a risk of illness that the claimant's employers ought to have foreseen and ought to have properly averted; otherwise, the claim must fail.

The House of Lords (now the Supreme Court) had the opportunity to review the principles laid down in *Hatton* in *Barber v. Somerset County Council* (2004). This appeal involved one of the original claimants in the joined appeals in *Hatton*, who lost his claim in the Court of Appeal. The claimant was a maths teacher who was given additional co-ordinating and managerial responsibilities in order to maintain his existing income level following a restructuring of the school in which he worked. As a result, his working hours increased to between 61 and 70 hours a week and after some months of trying to cope, he complained to his deputy head teacher that he was overwhelmed. Nothing was done and a few months later, he suffered further stress and depression and was absent from work.

Ultimately, he left the school because of his poor health. Psychiatrists agreed that he was suffering moderate to severe depression and the claimant was successful at first instance. The school should have appreciated that the risk to the claimant's health was significantly greater than it would have been to another teacher with a high workload and yet it failed to act. This decision was reversed by the Court of Appeal in the joined *Hatton* appeals. The House of Lords held that the Court of Appeal had failed to pay sufficient attention to the claimant's sickness record and its medical explanation and held that the local authority was in breach of duty of care by being aware of the difficulties that the increased workload was causing the claimant and his associated medical consequences but failed to do anything to remedy it.

Cases such as *Johnstone, Walker, Ingram and Barber* caused some employers to feel concerned that court decisions had created a wide scope of potential legal liability, given the growing awareness of workplace stress. To what extent, if at all, could the legal framework be regarded as encouraging a compensation culture and placing excessive burdens on employing organisations? This paper assesses the scope of liability for workplace stress through an analysis of some of the legal claims made and evaluates whether these sorts of fears are justified.

Methodology

The term *claimant* is used to refer to the worker who made the original complaint of workplace stress and the term *defendant* refers to the employing organisation defending the claim. In an attempt to establish the number and type of claims brought forward, the population of individual case records relating to workplace stress was accessed electronically from a variety of legal databases. These court cases are real scenarios, in which the various organisations faced civil action arising from workplace stress claims. The main contribution that this research makes to the existing body of literature on the subject is to discern the

different contexts that led to litigation in these cases (Lockwood 2015).

Case Analysis

The findings on workplace stress litigation in this paper are divided into five main sections: (i) types of workplace stress claims; (ii) categories of persons who bring cases to court and their occupations; (iii) alleged factors causing harm; (iv) outcome of claims; and (v) employment relations issues. Some preliminary words of caution should be entered about the findings. The cases examined here are limited to those cases that were litigated, however many other claims will have been withdrawn or settled out of court. What we are concerned with here are the findings based on the legal record.

(i) Types of Workplace Stress Claims

With regard to the nature of workplace stress claims, the majority of claims are related to clinical depression (35%), followed by mental breakdown (24%), anxiety/stress disorders (21%), and psychological distress (20%). Whilst these are the general terms used, there is likely to be significant overlap between diagnostic terms used by clinicians (depression, anxiety) and other terms such as breakdown and distress. From a clinical perspective, many of those whom experience distress or a breakdown will also have anxiety and/or depression. In most cases, the consequence of suffering from workplace stress was that the claimant never returned to work for that employer. The assertion that the most common types of workplace stress suffered by claimants are related to stress, anxiety, or depression is consistent with the occupational and mental health survey analysed by Stansfeld et al. (2011), which reported that mixed anxiety/depressive disorder had the greatest prevalence.

(ii) Categories of Persons Who Bring Cases to Court and their Occupations

Since the landmark case of *Hatton v. Sutherland* (2002), 65% of claimants in workplace stress litigation have been male, whereas 35% were female. Women and men employed in manual labour jobs in which low pay, long hours, and the pace of work were cited as significant issues constituted a large proportion of litigated cases. This reflects the findings that manual work can often be associated with a lack of control over jobs, high noise levels, and poor work conditions all of which contribute to anxiety and depression (Tennant, 2001). The majority of claims made by men were related to clinical depression or psychological distress—alleged to have been caused by either excessive workload or bullying. Meanwhile, the particular demands placed on women workers are often referenced in cases because women often carry a double burden, juggling paid employment with childcare and domestic responsibilities. They are also more likely to be working unsocial hours and caring for the elderly and disabled. Balancing these conflicting demands presents significant risks to mental health. Women, therefore, are often likely to experience both the role conflict and role overload that manifests itself in terms of severe anxiety and stress disorders.

Research has revealed that one in six women and one in nine men are likely to require treatment for a psychiatric illness during their lifetime (Parliamentary Office of Science and Technology, 2007). A national survey of occupational and mental health in the UK carried out by Stansfeld et al. (2011) found that women demonstrated a higher occurrence of common disorders than men across all major standard occupational classification groups. For example, the prevalence of common mental disorders (CMD) for women in professional occupations was almost double that of men in professional occupations (Stansfeld et al., 2011). CMD refers to depressive and anxiety disorders, including depression, generalized anxiety disorder, mixed anxiety and depression, panic disorder, obsessive compulsive

disorder (OCD), post-traumatic stress disorder (PTSD), phobias, and social anxiety disorder (NICE 2011).

Claimants' occupations covered a wide spectrum, with the largest proportion of claimants working in the professional category, followed by manual workers. Perhaps it is the cases of work-related stress in the teaching profession that have attracted the most media attention; however, the teaching profession was not over represented in terms of the number of litigated cases. The same was true for the National Health Service (NHS), which seemed surprising because a variety of researchers have reported that stress and the effects of stress are particularly widespread among health-care professionals (Loretto et al., 2010; Health and Safety Executive, 2013). A plausible explanation might be that, in both teaching and health, the majority of incidents and claims are settled out of court with the help of trade unions or professional representation. However, Hale's observation in *Sutherland* is interesting to note: "There are no occupations, which should be regarded as intrinsically dangerous to mental health" (para. 4). However, the Health and Safety Executive data suggests the contrary and the occupations with the highest estimated rate of work-related stress in the UK, averaged over the last three years (2010/11, 2011/12 and 2013/14), were as follows: welfare and housing associate professionals with 2 830 cases per 100 000 people working in the last 12 months; nurses with 2 630 cases per 100 000 people; teaching and education professionals with 2 310 cases per 100 000 people; administrative occupations, government and related organisations with 2 310 per 100 000 people; and customer service occupations with 2 160 cases per 100 000 people working in the last 12 months. These occupations have statistically significantly higher estimated prevalence rates of work-related stress than across all occupations averaged over 2010/11, 2011/12 and 2013/14 (HSE).

A wide variety of literature has consistently demonstrated an association between the high rates of potential psychiatric illness in hospital employees when compared to the general

working population (Tenant, 2001; Stansfeld et al., 2002). With respect to the NHS, it was evident from the case analysis that front-line staff, such as doctors and nurses, also face a significant risk of encountering workplace stress that arises from aggression in the work environment. Whilst the National Health Service (NHS) in Britain has developed a zero tolerance policy on bullying, violence and harassment, there is evidence that medical professionals are subject to abusive behaviour both from within the organisation and through their contact with the public (Shields & Wheatley Price, 2002; Deery, Walsh, Guest, 2011). In 2009, over a quarter of frontline NHS staff reported that they had experienced bullying, harassment or abuse from patients or their relatives and around one in six reported those forms of hostile behaviour from either their line managers or other work colleagues (NHS Care Quality Commission, 2009; Deery, Walsh, Guest, 2011). Such factors can have a serious impact on an individual's health in the workplace. The case analysis also revealed that in claims relating to health workers and the police there was evidence that shift work was associated with a number of occupational stress claims. This is an area of research that is not yet well established and would benefit from further research, although it is beyond the scope of this paper (Ma et al., 2015).

(iii) Alleged Factors Causing Harm

The causes of workplace stress most commonly alleged in the litigation include: excessive workload (42%), followed by poor management practices (23%), organisational, economic or technical change (15%), aggressive management style (12%), and bullying by co-workers (8%). A number of work-related issues referred to by claimants in legal action as being particularly prevalent included: (a) lack of control and conflicting demands (particularly among lower grade workers); (b) poor relations with work colleagues; (c) poor

working environment; (d) work with a significant emotional element; (e) repetitive work, boredom and lack of job satisfaction.

With respect to litigation arising in the context of a claimant experiencing health problems due to an excessive and complex workload with varied and deadlines, there was evidence that employers did not manage the work process effectively and failed to respond to the concerns raised by the individual employee. For example, in *Jones v. Trainwell Training Centre* the employee complained several times about an excessive workload (the judge found that she was having to work grossly excessive hours beyond the 37 hours per week stipulated in her contract of employment, (para. 61). However, nothing was done to alleviate the difficulties, even though Human Resources realised that the person was doing the work of two or three. The combination of the manner in which the employee was being treated and her formal complaints about it made injury to her health foreseeable, and it is not difficult to identify what might have been done to prevent the injury, which in fact occurred. The failure to do this materially contributed to the claimant's mental illness. The employer knew the employee was being badly treated and could have done something to prevent it, for example, by ceasing to make unreasonable demands of the claimant.

Workplace change and its efficient management were prominent in the cases analysed are other important factors that can have an impact on individual workplace health. It is evident that well managed change and the provision of good communication and training and development opportunities can help alleviate workplace stress (Loretto et al., 2010:536). Despite the proliferation of progressive management practices (Kanter, 1989) and legislative efforts to protect workers' rights, a culture of fear amongst employees with regard to workplace change can be blamed for stress caused by such practices (Ashkanasy & Nicholson, 2003:24).

(iv) Outcome of Claims

In relation to the outcome of legal claims, the case analysis demonstrates that the law places significant hurdles before claimants, with only 6 per cent of claimants being successful. This case analysis makes it possible to determine why individual claims were won or lost and to identify particular characteristics as being associated with success or failure. For example, in cases of personal injury caused by bullying and victimization by colleagues successful cases were often decided on the basis that the employer was vicariously liable for the staff members' actions and accordingly was in breach of duties owed according to common law. In such cases, it was noted that management was lax, staff discipline poor, and organisational management chaotic. Organisations were viewed as creating or permitting a "culture of abuse" with such actions. In *Waters v. Commissioner of Police of the Metropolis* (1997) it was held that the employer could be liable for psychological harm caused by failing to take a complaint of sexual assault by a fellow officer seriously, and by allowing the employee to be subjected to further victimization and harassment by another officer after she had made the initial complaint.

In cases in which the claimant was unsuccessful in the legal action relating to workplace bullying, there were two primary reasons accounting for the failure. First, the courts took the view that whilst managerial behaviour is often unpleasant and undesirable it was not considered sufficiently serious to amount either individually or cumulatively to bullying or victimization so as to entitle the claimant to compensation (*Barlow v. Borough of Broxbourne* [2003]). Second, even if the court did hold that the defendant, through its officers, bullied or victimized the claimant, the action for damages still failed because the courts often take the view that there was insufficient evidence that anything happened which either did, or should have, put the defendant employer on notice that the actions taken by its

staff over the period in question would, or might cause, psychiatric or physical harm to the claimant.

The key characteristics of workplace stress cases based on excessive workload were: the introduction of changes to working practices by management; problems with communication and consultation between management and staff; increased working hours; increases in the volume of work; and lack of management response to complaints about new working practices. Many claimants suffer mental illness and depressive conditions due to the strains and stresses of their work situation, be it due to overworking, the tension of difficult and complex relationships, worries about career prospects, or fears or feelings of discrimination or harassment. However, the court decisions confirm that unless there was a real risk of breakdown that the claimant's employers reasonably ought to have foreseen and properly ought to have averted, there can be no liability (see Brown LJ, *Garrett v. Camden London Borough Council*, [2001], EWCA Civ 395, para. 63.) An important point for potential claimants and their legal representatives to consider is that a successful claim is unlikely to be maintained where the claimant during the period under consideration did not make anyone aware that they were having difficulty with the workload expected of them and that it was causing medical problems. Thus, while the employee may very well wish to minimise or conceal the true state of affairs from his employer as no one wants to be considered unable to cope, suffering in silence might have a detrimental impact on a future legal action (*Sutherland v. Hatton* [2002]). The failure to inform others about health problems caused by workload will be damaging to any claim.

It should be noted that a claimant might be entitled to recover damages with respect to injury to mental health caused by one single episode of acute stress at work, resulting in post-traumatic stress disorder, for example. The majority of successful cases are concerned with chronic stress arising from an accumulation of work-related demands and conditions: for

example, see *Walker v. Northumberland County Council* (1995) 1 All ER 737; *Rorrison v. West Lothian College*, (2000) S.C.L.R. 357; *Fraser v. The State Hospitals Board for Scotland* (2001) S.L.T. 1051; and *Cross v. Highlands and Islands Enterprise* (2001) S.L.T. 1060. It is conceivable that an employee might suffer psychiatric illness as a result of one acute episode of stress. For instance, the employee might be instructed to undertake a task which could be reasonably foreseen in the particular circumstances to cause psychiatric harm (*Keen v. Tayside Contracts* [2003], Scottish Cases 55; para. 66; *Corr v. IBC Vehicles Ltd.*, [2008] UKHL 13).

In the context of foreseeability, the question is whether the kind of harm caused to the specific employee was reasonably foreseeable, not whether psychiatric injury was foreseeable in a person of reasonable fortitude. In order to succeed, a claimant must be able to prove that an employer had such knowledge that would make the injury reasonably foreseeable—not simply that an employee would be distressed or upset or emotionally disturbed by certain circumstances or events, but that the claimant in particular would suffer psychiatric damage (Paton, L., *Keen v. Tayside Contracts*, [2003], Scottish Cases 55; para. 68). It is insufficient for a claimant to make general allegations about a growing awareness of the possibility of psychiatric damage. In *Easton v. B&Q* (2015), the claimant was diagnosed with depression in May 2010. With the exception of two short and unsuccessful attempts to return to work in September 2010 and January 2012, Mr Easton never worked for B&Q again. Mr Easton claimed that his illness was caused by occupational stress and that this occupational stress was due to the negligent behaviour of his employer. B&Q accepted that Mr Easton had suffered a psychiatric illness and that his medical situation was caused in considerable measure by occupational stress. However, B&Q argued that Mr Easton's illness was not foreseeable at any stage. This was held. Mr Easton's claim failed at the first hurdle of foreseeability in respect of his first breakdown. Mr Easton had spent his 10-year managerial

career in charge of large retail outlets. He had no history at all of any psychiatric or psychological problems. Nothing about him gave anyone reason to suspect that he might succumb to a psychiatric illness. There was nothing about Mr Easton which put anyone on notice that he might suffer psychiatric illness but also there was nothing about the occupation of store management in general that would give rise to foresee such risk (para. 50). Similarly, in *Deadman v. Bristol City Council* (2007), the Court of Appeal concluded that it was not reasonably foreseeable that a breach would cause psychiatric harm. The Court of Appeal found there was nothing to indicate that the claimant's health would be affected by the way the council undertook a grievance investigation.

One issue for employers to carefully consider is the provision of a counselling service for their employees. Case law makes clear that the availability of counselling is a relevant matter to consider with regard to stress at work cases. 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 (*Hatton; Hartman*). However, it should be noted that in *Dickens v. O2* (2008) EWCA Civ 1144 and *Intel UK Ltd v. Daw* (2007) the Court of Appeal ruled that providing access to counselling might not always discharge the employer's responsibility. Where it is evident that an employee's health may be harmed by stress at work, an employer needs to tackle the cause of the stress rather than merely making the employee aware of a counselling service (Bonino, 2008).

(v) Employment Relations Issues

Where excessive hours were at the centre of litigation in both successful and unsuccessful cases, there was also evidence of changes to organisational policies and working practices that put extra pressure on staff and significantly increased their working hours with minimal consultation. It was evident that both the quantity and rate of change resulted in

change fatigue and workplace stress (Eriksson, 2004). From an employment relations perspective, an improved system of managing change might have prevented staff dissatisfaction and lengthy and costly court proceedings, for which the time and expense often seemed disproportionate to the substantive issues in the case and the true value of the claim. Greater care needs to be taken by management to isolate the issues causing workplace grievances and deal with them more effectively, rather than letting them spiral out of control. It is also important for management to monitor what is happening in the work environment, for example, has the employee been arriving at work late or has the employee informed a manager of stress or illness caused by work?

There was also evidence of management rushing to implement disciplinary sanctions when they viewed employees to be underperforming rather than trying to isolate the cause of the problem and act in a more supportive way in an attempt to bring about an improvement in employee performance (*Barlow v. Borough of Broxbourne* [2003]). An employer might also have to consider whether the nature of the work being undertaken might make certain categories of worker more vulnerable to stress. In *Melville v. Home Office* (2005) the Court of Appeal stated that if the employer could foresee the risk of harm, because of the nature of the job, then the employer did not have to foresee harm to a particular employee. Thus, an employer was liable for the breakdown of a healthcare worker in a prison who had the job of removing the bodies of suicide victims. His illness was caused by the last suicide before going off sick and the employer was held liable.

The duty of an employer is to prevent foreseeable injury and employers are liable if a failure to take action leads to an employee suffering foreseeable loss. An employer might become aware of a health issue in a variety of ways, for example the way the work is organised or allocated because the employee has a health problem, although it is ultimately the responsibility of the employee to make the employer aware of their health problem, as

complaining about being overworked or discussing the possible risk to their health with anyone other than their employer is not sufficient (Lockton, 2010).

Effective workplace stress management policies were important interventions that played a particularly significant role in preventing legal action and reducing the detrimental experience of employees. Poor management and organisation are key contributors to legal action for workplace stress cases. When an organisation provides effective internal processes to tackle and deal with workplace stress cases this can be an important tool in avoiding legal action arising from workplace stress. Employees are made more confident that the organisation will take serious efforts to deal with situations where employees are struggling to cope.

Conclusion

At a time when the danger of a so-called “compensation culture” spawning a “litigation crisis” has come to dominate much public and political discourse (Williams, 2005, p. 499), it would not be surprising if employers were concerned about judicial decisions that appear to expand the scope of liability for workplace stress. However, from the case analysis, it cannot be plausibly or reasonably argued that employers face mass litigation on the basis of workplace stress. This analysis reveals that an unduly onerous burden on employers has not been created by the legal decisions made in such cases. In reality, a claimant has substantial legal and evidential hurdles to overcome. In determining cases, the courts attempt to balance the interests of the employers and the employees, taking into account a variety of factors. For example, the courts need to balance the interests of an employer in terms of upholding contractual arrangements and promoting efficiency in the enterprise (Lord Roger, *Barber*, para. 34) and the interests of employees in terms of their protection from unreasonable work expectations (Lord Walker, *Barber*, para. 44). With respect to public sector employers, Hale

LJ has stated that they cannot expose their employees to unacceptable risk, but added that “what is reasonable in relation to employee safety may have to be judged in the light of the service’s duties to the public and the resources available to perform those duties”.

It is also possible that legal developments have prompted managerial and organisational changes designed to improve the working environment in order to minimize the likelihood of facing claims for workplace stress, so for that reason the law could be regarded as having had a positive impact. The legal framework plays an important role in terms of prevention, corrective measures and compensation (Yamada, 2007).

In occupational stress cases, courts of first instance in both England and Scotland have emphasised that, in order to succeed, a claimant must be able to prove that an employer had knowledge such that it was reasonably foreseeable not simply that an employee would be distressed, upset, or emotionally disturbed by certain circumstances or events, but that he would suffer psychiatric harm as a result; for example, see: *Walker v. Northumberland County Council* (1995); *Rorrison v. West Lothian College* (2000); *Fraser v. Greater Glasgow Health Board* (2003); *Cross v. Highlands Enterprise* (2001); and *Green v. Argyll and Bute Council* (2003). As Taylor and Emir have observed:

Sufficient case law now exists for us to reach considered conclusions about the extent to which employers should fear stress-based personal injury claims and hence how these situations should be handled in practice. From the outset we can say that there are a number of widely believed myths about the way the law treats stress which have tended to make employers over-cautious and act as something of a barrier to the effective and fair management of stress cases in the workplace. In fact the case law is very helpful to employers, and only those who act in a clearly unreasonable way need to have any real fear of paying out large amounts of compensation (Taylor and Emir, 2015: 498).

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