

STRESS IN THE WORKPLACE – EMPLOYERS SHOULD BE ALERT TO THE CLAIMS WHICH CAN ARISE

Brian Morgan, Solicitor, advises employers that stress-related Claims will give rise to more than just Unfair Dismissal Hearings.

Employers have a legal duty to their employees to take reasonable care for their safety at work. Up to the beginning of the 1990's this duty almost exclusively concerned physical injuries. Since then, the law has developed to include a duty to take reasonable care for their safety from mental, psychological or psychiatric injuries that emanate from workplace stress, harassment and bullying. In this article we shall concentrate on stress injury, which can arise from excessive workload rather than from bullying and harassment. While work related stress can be a good motivator, too much stress or unrealistic expectations can affect workers' health and lead to problems with performance and attendance, which in turn can translate into legal claims.

What is stress?

'Stress' is not an illness in itself, despite the fact that many doctors will put it on a medical certificate. The E.U. Commission's document, "Guidance on work-related stress" defines work-related stress as:

"the emotional, cognitive, behavioural and physiological reaction to aversive and noxious aspects of work, work environments and work organisations. It is characterised by high levels of arousal and distress and often by feelings of not coping".

The Irish Health and Safety Authority defines stress as arising;

"when the demands of the job and the working environment on a person exceeds their capacity to meet them".

The U.K. Health and Safety Executive defines stress as:

"the adverse reaction people have to excessive pressure or other types of demand placed on them".

However, long-term or (severe) stress can, result in actual physical and/or mental illness. This could give rise to the following types of legal complaints; personal injury, constructive dismissal, unfair dismissal, discrimination and disability discrimination;

Personal injury

A personal injury claim in this context is an allegation that the employer has failed in its duty to take reasonable steps to ensure an employee's safety and to protect him or her from reasonably foreseeable risks.

Where an employee:

- suffers a recognised illness (eg clinical depression);
- as a result of the employer's negligence; and
- the employer could reasonably have been expected to foresee that this might happen

the employee can recover unlimited damages for the illness, including damages for loss of income, pain and suffering and loss of amenity (which could include loss of enjoyment of hobbies, the loss of the ability to form relationships, etc). This type of claim is brought in the High Court or County Court (NI)/Circuit Court (ROI).

The U.K. Court of Appeal's judgment two years ago in **Sutherland v Hatton [2002] IRLR 263 CA**, emphasised the difficulties that employees face in trying to recoup damages from their employer for the effects of work-related stress. The guidance set out by the Court of Appeal in *Sutherland* was widely hailed as a watershed, that significantly reduced the prospects of success for employees pursuing personal injury claims for stress-induced psychiatric damage. The court ruled that employees must show that a stress-related injury was both foreseeable and caused by work-related pressures (rather than, for example, domestic or financial problems). Moreover, employers could generally take employees at face value and assume that they were up to the demands of their job, with the onus being on an employee to alert management if stress-related problems occurred.

The *Sutherland* case followed the broad principals which had been enunciated in the first landmark U.K. stress related case, **Walker v Northumberland County Council [1995] 1 All ER 737**, which placed emphasis on the fact that any illness suffered by the employee should be reasonably foreseeable. However, Employers should take account of another U.K. case **Cross v Highlands and Island Enterprises [2001] I.R.L.R. 336**, in which the Court appeared to place much more emphasis upon the working conditions. The Court explicitly stated that employers have a duty to take reasonable care not to subject employees to working conditions that are with reasonable foresight likely to cause some psychiatric injury or illness. Hence, in *Walker* the reasonableness of working conditions depended entirely on what an employer knew or ought to have known about the individual's susceptibility, of the employee at risk. Under the *Cross* decision, an employer can now be blamed irrespective of his or her state of knowledge of the employee's personal vulnerabilities or susceptibilities if the conditions of work themselves have been found to be negligent. Therefore, bearing in mind the different emphasis that has been placed on foreseeability and working conditions in both the *Walker* and *Cross* decisions it is perhaps not surprising that *Sutherland* was wildly hailed as a watershed.

The *Sutherland* case was one of four cases heard together and in one of those cases **Barber v Somerset County Council [2004] All ER (D) 07 (Apr) HL**, the employee appealed to the House of Lords. Mr Barber was head of maths at a secondary school. He was demoted in a restructuring exercise and ended up doing much the same work for less money and with less support. In order to maintain his former salary level, he took on extra work, which increased his working hours to between 61 and 70 a week. During 1995, Mr Barber began to develop symptoms of depression. In May 1996, his doctor signed him off work for depression, brought about by his workload, although he returned to work three weeks later. On his return, he had a meeting with the

headmistress and told her that he was finding things difficult. A few weeks later, he told one of the deputy heads that he could not cope and that the situation was becoming detrimental to his health, without being more specific. Over the summer holidays, Mr Barber continued to suffer symptoms of stress but he did not see his doctor again until October. In November, he lost control in the classroom and was advised to stop work immediately. He accepted ill-health retirement in March 1997.

The trial judge held that his injuries were the result of negligence on the part of the school. The headmistress had had a 'clear warning' that Mr Barber needed help to carry out his duties: he had told her that he was having difficulty coping and that his health was declining. As Mr Barber had already had time off work due to 'stress', **the school should have known that he was more vulnerable than other teachers with a similar workload.** In the judge's view, the school should have investigated his situation to see what could be done to help him and it was its failure to act that had led to Mr Barber's inability to cope and his depression, caused by stress at work. Mr Barber was awarded just over £100,000 damages.

The Court of Appeal overturned this decision ruling that, because Mr Barber had not told the school that the stress-related problems that he had previously brought to its attention were continuing, it could not have been expected to realise that he was still in difficulty. For this reason, his illness was not 'reasonably foreseeable' and his employer was not in breach of its duty of care towards him when it failed to take steps to prevent it.

The House of Lords disagreed and by a four to one majority allowed Mr Barber's appeal. According to the House of Lords, the mental breakdown that Mr Barber had suffered had been brought about by the pressures and stresses of his workload and his employer was in breach of its duty to protect his health and safety. The school ought to have taken proactive steps to reduce Mr Barber's work-related anxieties by, for example, making sympathetic enquiries and reducing his workload.

Problems for the employer

Employers will now need to be more alert to signs of mental illness and to keep up-to-date with the latest advice on handling workplace stress, to be able to discharge their duty of care. The problem for the employer is – should the full machinery of psychiatric investigation, in-depth interviews/counselling by the Human Resources or Personnel Department be triggered when a sick note arrives marked “depression”? What is to be done if the risk of mental illness seems real? Especially if the remedy may involve less responsibility and less pay, unpalatable to an ambitious employee, eager to improve his or her career and willing to take the risk of mental breakdown to prove how vital he or she is to an organisation.

Irish Caselaw

In Ireland, caselaw on the subject of work-related stress injuries has developed since 1987 with the Supreme Court decision of **Sullivan v The Southern Health Board [1997] 3 IR 123**. The Plaintiff was a Medical Consultant employed by the Defendant, who claimed that he was overworked because there was not another permanent Medical Consultant working with him as there had been when he began his employment. It was held that the Plaintiff was entitled to compensation “*for the*

stress and anxiety caused to him in both his professional and domestic life, by the persistent failure of the Board to remedy his legitimate complaints”.

In the case of **Curran v Cadbury (Ireland) Ltd**, which concerned nervous shock, the statement of McMahon J with regard to *Walker* is of note in accepting that “*there is no reason to suspect that our courts would not follow this line of authority if it came before the courts in this jurisdiction*”. One wonders whether this dictum would also now apply to the adoption of the reasoning of the House of Lords in the *Barber* decision.

The case of **Quinn v Servier Laboratories (Ireland) Ltd. (Irish Times, 28th April, 1999)** which concerned a claim for work related stress injuries, is reported to have settled without an admission of liability for a sum in the region of £200,000.00. The Plaintiff was a Salesman who had suffered two nervous breakdowns in 1994 due to work.

Constructive dismissal

Employers are also under two implied contractual duties that are relevant in cases of stress at work, these being:

- the duty to take reasonable care to protect workers' health; and
- the duty not to act in a way that destroys mutual trust and confidence.

Breaching either of these implied terms can amount to a fundamental breach of contract entitling the employee to resign and claim wrongful and/or constructive dismissal. However, for the employee to be successful in such a claim, the employer's breach must be very serious.

This issue arose in the UK Case of **Marshall Specialist Vehicles Ltd v Osborne [2003] IRLR 672 EAT**. Ms Osborne was a financial director of a company that was in difficulties and she voluntarily took on extra work and put in very long hours. She did not complain about the extra work until after her doctor had told her that her health was suffering, although she had been tearful on a number of occasions at work and told a colleague that she did not seem to be able to cope. When she did complain about her workload, she failed to mention that it was affecting her health. Ms Osborne eventually resigned, claiming constructive dismissal. She suffered a nervous breakdown while working her notice period.

The Employment Tribunal tried to create a new implied contractual duty for employers; to prevent employees taking on workloads so stressful that they could foreseeably damage their health. However, the Employment Appeals Tribunal rejected this idea and the law remains that the employer's conduct has to be so serious that it is a fundamental breach of either the health and safety or the mutual trust and confidence obligation. The court was heavily influenced by the Court of Appeal's ruling in *Sutherland v Hatton* (see above) and essentially applied the same approach to stress-based constructive dismissal claims.

The most celebrated Irish Case on constructive dismissal relating to work related stress injuries is the Employment Appeals Tribunal decision in **Liz Allen .v. Independent Newspapers (Ireland) Limited [2nd August 2001 UD 641/2000]** where Mrs. Allen was awarded £70,500.00IR compensation, which included future financial loss. The case also related to alleged harassment and bullying. It is worth noting that the Tribunal ruled that the treatment she received “*undermined her confidence and health to such a degree that she could not tolerate her working environment and was left with no other option but to resign*”.

Unfair dismissal

Until recently, stress-type issues were thought to be irrelevant to an ordinary unfair dismissal claim in that Employment Tribunals did not award damages for non-financial loss. However, the position in the UK may have been changed as a result of the decision in **Dunnachie v Kingston upon Hull City Council [2004] IRLR 287 CA**, in which the Court of Appeal held that damages are possible for 'real injury to self respect'. This could include injury to feelings and/or psychiatric damage caused by the manner of a dismissal.

For example, an employer in Northern Ireland who that puts an employee through an unfairly stressful disciplinary process that causes him or her some psychiatric injury (or even just a lot of distress) could face a claim for damages in respect of those elements. Awards in total in unfair dismissal claims cannot exceed the statutory ceiling. However, adding a stress claim might significantly increase the potential damages and make it more difficult and expensive for the employer to fight the case, particularly if medical evidence is needed. This may have the effect of pushing up the costs of reaching financial settlements with employees on termination of their employment. It should be noted that the employer's appeal to the House of Lords in *Dunnachie* was recently heard, with judgment expected soon, so the legal position remains unresolved for the time being.

This approach has not been followed in Ireland, albeit that on occasions the Employment Appeals Tribunal in Ireland can tend sometimes to be generous in its calculation of loss of earnings, which leads one to assume that the Tribunal does want to give some form of redress to the employee who has been put through a particularly stressful time by his employer.

Discrimination

In Northern Ireland race, sex, disability, religious or sexual orientation discrimination or in the Republic of Ireland discrimination arising because of gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the travelling community causes stress, this can lead to an increase in the compensation awarded by the tribunal. This may be in the 'injury to feelings' element of the award, but if the effect of stress causes a psychiatric injury this too can be compensated.

In a recent UK case involving a construction worker, the issue was whether an employer could be liable for injury that it had caused, but which was not a 'reasonably foreseeable' consequence of its actions. **Essa v Laning Ltd [2004] IRLR 313 CA**, involved a 'grotesquely offensive' and racially abusive comment made to a black construction worker, Mr Essa, who was also a successful amateur boxer. This caused him to suffer serious psychiatric illness, which in turn affected his boxing career and shattered his confidence in looking for work. According to the Court of Appeal, the test is not whether the employer could or should have foreseen that the discrimination would have such a bad effect on the employee, but whether it actually did so. If it did, the employer is liable unless the worker did not take reasonable steps to mitigate the damage.

While there is a statutory ceiling on awards for discrimination in the Republic of Ireland, there is no cap on the compensation that can be awarded in a discrimination claim in the United Kingdom but the UK Court of Appeal held in **Vento v Chief Constable of West Yorkshire Police (no.2) [2003] IRLR 102 CA**, that there should be three bands of compensation for injury to feelings, these being:

- £15,000 to £25,000 for the most serious category;
- £5,000 to £15,000 for less serious cases; and
- £500 to £5,000 for the least serious cases.

Although there can be separate awards for injury to feelings and psychiatric injury in an appropriate case, in **HM Prison Service v Salmon [2001] IRLR 425 EAT**, the Employment Appeal Tribunal stressed that where separate awards are made, tribunals must be alert to the risk of compensating essentially the same suffering twice under different heads.

Disability discrimination

If the condition suffered by a stressed employee is sufficiently serious, it could amount to a disability in Northern Ireland under the Disability Discrimination Act 1995 and in the Republic of Ireland under the Employment Equality Act, 1998 and dismissal of the employee or a failure to make 'reasonable adjustments' could amount to unlawful discrimination.

Stress in itself is not a disability for the purposes of the Disability Discrimination Act 1995 **Morgan v Staffordshire University [2002] IRLR 190 EAT**, but a stress-related condition might be if it amounts to 'a physical or mental impairment' that has 'a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities'.

'Physical impairments' caused or made worse by stress might include a heart condition, migraines, epileptic fits and digestive problems. All these are capable of amounting to a disability.

For a 'mental impairment' to amount to a disability it must be one that is clinically recognised, such as depression, and should be backed up by expert medical opinion. A simple statement that someone is suffering from depression will not be enough. In **Morgan v Staffordshire University [2002] IRLR 190 EAT**, Ms Morgan had been

assaulted by a female supervisor whilst at work and resigned claiming constructive dismissal and mentioning the stress and anxiety that the assault had caused her. She later added a claim of disability discrimination. No medical evidence was given at the tribunal, although copies of her medical notes were produced. These referred to 'anxiety', 'stress' and 'depression'. According to the Employment Appeal Tribunal this was not enough to establish a mental impairment for the purposes of the Disability Discrimination Act 1995.

It is unlawful discrimination under the UK Disability Discrimination Act 1995 and the Republic of Ireland Employment Equality Act, 1998 for an employer to treat disabled persons less favourably than other persons for a reason relating to their disability unless it can be shown that the treatment is justified.

It would be unlawful discrimination to fail to make reasonable adjustments. Under the Disability Discrimination Act 1995 and the Employment Equality Act, 1998 this duty applies where any physical feature of premises occupied by the employer or any arrangement made by or on behalf of the employer causes substantial disadvantage to a disabled person compared with non-disabled people. The employer has to take reasonable steps to prevent that disadvantage. For example, if an employee suffering from a mental impairment as a result of a stressful workload told his or her employer that, unless the workload was reduced, he or she could not continue to work and the employer failed to reduce the workload without good reason, this could amount to unlawful discrimination under both UK and ROI legislation.

Criminal offences

Employers' duties under the Northern Ireland Health and Safety at Work (NI) Order, 1978 and the Irish Safety Health and Welfare at Work Act, 1989 include:

- ensuring, as far as is reasonably practicable, the mental as well as the physical health, safety and welfare at work of their employees;
- providing and maintaining a working environment that is safe and without health risks, which includes ensuring that employees have adequate training to cope with their job and that they are appropriately supervised;
- giving employees whatever information, instruction, training and supervision is necessary to protect them.

Employers must also carry out written Risk Assessments (under the NI Management of Health and Safety at Work Regulations (NI) 2000 and the Irish Safety Health and Welfare at work (General Application) Regulations 1993) to identify any hazards in the workplace, which includes any work-related factors that could cause serious or long-lasting stress. A Risk Assessment should also identify who is at risk, and how the risk can be reduced to an acceptable level.

How to prevent claims arising

Now that we have seen the claims which can arise, we will take a brief look at the manner in which an employer can attempt to prevent claims arising in the first instance.

The Risk Assessment

Employers should:

- **Identify the hazards**
For example, look out for departments in the office where there is low communication, poor relationships with superiors. Is there a lack of variety or short work cycles? Are employees properly trained to perform the tasks? Is there work overload? Are there unpredictable working hours?
- **Decide who might be harmed**
Identify the employees who may be under severe stress. A book could be written on this but essentially one should look out for employees who are exhibiting signs of illness such as tearfulness, impulsiveness and out of character behaviour, irritability, development of a variety of illnesses or conditions not medically explained.
- **Evaluate risk**
Identify what action has already been taken. Decide whether this is enough. If not, decide what more should be done. Essentially, the employer should ensure that there are sufficient communication skills within the office and that employees have the capabilities and competence for their tasks, that relationships between colleagues and between colleagues and managers are good and that there is adequate training.
- **Record findings**
It is good practice to record the main findings from the Risk Assessment and to share the information with the employees and their Representatives. The findings should be incorporated into the employer's Safety Statement.
- **Review the Assessment at appropriate intervals and check the impact of measures taken**
The assessment should be reviewed whenever significant changes happen in the organisation. This should also be done in consultation with employees. The impact of measures taken to reduce work related stress should be checked.

What if a complaint is made?

The employer must carefully listen, consider what he or she is told about the working environment by the employee and ultimately make any necessary changes either in terms of resource, discipline or re-distribution of labour. In particular, remedial medical advice or therapy should be provided and paid for by the employer where possible, both to ascertain a better diagnosis of the problem and a treatment for it. Pending the outcome of these precautionary measures, if the employee remains in the workplace, the employer must direct him or her to reduce his or her workload by not engaging in the excessive work-related activity that gives rise to concerns of the stress related illness or injury.

In some instances, where the employee's symptoms are serious, the employer may be obliged to consider the following options:

- **Suspension**

If the employer has a concern about a continuing, serious risk to the mental health of an employee which is work related, it may be advisable that the employee be relieved of his or her duties for a period on full salary pending the employer investigating the matter so that the advice and assistance of health or occupational professionals about what to do can be obtained.

- **Dismissal**

This would arise where an employee is no longer capable of working by reason of long-term ill health to perform the job for which he or she was employed. In these circumstances, there is no legal duty on an employer to make "light work" for an employee who after been accorded fair procedures, may be dismissed. However, it is essential that, if undertaking dismissal, the employer affords to the employee all fair procedures, including counselling or medical services available and issue warnings before doing so. In any event dismissal should never be undertaken without obtaining legal advice.

In all instances, the employer should have the employee examined by an Occupational Physician/Therapist who will assist the employer in coming to a decision on what course of action to adapt. Only a very foolish employer would undertake any action without obtaining the opinion of a health or occupational professional.

It has never been so important for an employer to ensure the provision of proper policies in the workplace to ensure compliance with both Health & Safety and Employment Legislation.

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June, 2004