Published on *The National Law Review* https://natlawreview.com

UK High Court Gives Useful Recap On Liability For Stress-Induced Psychiatric Illness In The Workplace (Part 1)

Article By:

David Whincup

Every so often, there comes along a case which becomes the new baseline by which decisions in a particular field are made. In relation to employer liability for psychiatric illness caused by workplace stress, that case is **Hatton -v- Sutherland** in 2002, still going strong after 13 years and most recently upheld by the High Court in **Easton -v- B&Q** at the end of last month.

Easton was about a store manager who suffered serious psychiatric injury through workplace stress. It was accepted by B&Q both that Mr Easton was indeed ill and that this had indeed been caused by work. However, more than this is required to establish legal liability – in addition it must be a reasonably foreseeable consequence of the employer's culpable conduct that the employee suffers that illness. This is much harder to prove than it sounds – it may well be foreseeable that certain employer behaviour will leave the employee alienated, angry, miserable, bitter, embarrassed, etc., but these are just ordinary incidents of the fair wear and tear of working life and are not the same as active psychiatric injury. Mr Easton failed primarily because of the foreseeability principles set out in **Hatton**, so unimprovable that the High Court simply repeated them in full. Here are the main ones in italics, with our commentary where appropriate:

- *Foreseeability depends on 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 the job unless he knows of some particular problem or vulnerability.*

- *The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.*

- *Factors likely to be relevant in determining whether this kind of harm to this particular employee was reasonably foreseeable include:*

- *the nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work partiuclarly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of*

sickness or absenteeism in the same job or the same department?

- *signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?*

So if the answer to these questions is no, the employee will have a far harder time establishing the necessary foreseeability of injury. On the other hand, if the answer to any of them is yes for any material period of time, the judicial temperature drops very quickly and suddenly it is the employer which is up against the wall on the issue of why it did nothing to help. Do remember that while a yes should perhaps trigger further enquiries by the employer, it in no sense automatically means that stress is an issue – years ago my father began to suffer from breathlessness and dizziness in the office, both recognised signs of stress, but a problem resolved by his adopting a larger collar size.

- *The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee.*

- The exception to this, ironically, is in relation to psychiatric illness where the illness may distort the employee's perception of what he is fit to do. A much closer eye on his re-integration and rehabilitation is therefore required than for a physical injury, regardless of what he tells his employer.

This can work harshly on the employee. **Hatton** made it clear that no-one could blame an employee who tries to soldier on despite his own fears that he is not coping or who is reluctant to give clear notice to his employer of the stress he feels – his very job, let alone his credibility or hopes of promotion, may be at risk. Equally, however understandable the employee's outward stoicism, it will be difficult to blame the employer for failing to pick up a problem which the employee is doing his best to hide.

- *To establish foreseeability, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.*

- In other words, seeing an employee behaving out of character once means nothing as the emotional, physical and behavioural tell-tales of excessive stress may initially be slight and explicable by other causes. If they persist then you should ask the employee if there is anything wrong. If the answer is no, see paragraph 4 above.

So as employer you can usually adopt a reasonably robust view of your exposure to stress claims. Remember, though, that once there is an audible protest, the foreseeability hurdle is surmounted and the onus is then suddenly on you to explore and if necessary, remedy. As employee, the lesson from **Hatton** (reinforced in **Easton)** is that there will be *nul points* in the High Court for suffering in silence. Poor Mr Easton, undoubtedly damaged by his job, was too brave for too long – in neither formal appraisals nor casual meetings with his manager did he make any complaint recognisable as

more than just routine griping. His illness was just not foreseeable.

In Part 2 we will consider when the employer is guilty of culpable conduct in handling a stressed employee.

National Law Review, Volume V, Number 98