Occupational Stress in the Coronavirus Pandemic: What Has Changed?

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The coronavirus pandemic has transformed the way many of us work. This blog post primarily considers the potential implications of home working on occupational stress claims by looking closely at the key case law in this area. Some observations are also offered as to the impact of the pandemic on occupational stress claims where an employee's job brings them into direct contact with COVID-19.

In April 2020, 46.6% of people in employment did some work at home. Of those, 86% did so because of the coronavirus pandemic and 30% reported working more hours than usual. This poses a number of potential issues in occupational stress claims. Even before the current pandemic, a study conducted in 2017 by the International Labour Organization and Eurofound identified several disadvantages associated with working away from the office. Those disadvantages included a tendency to extend working hours, to have blurred boundaries between work and personal life and to experience an intensification of work, isolation and burnout.

What is the established law?

The essence of an occupational stress claim for which liability may arise, has been distinguished from non-tortious stresses from work thus (*Garrett v London Borough of Camden* [2001] EWCA Civ 395 at [63]):

> "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 simply overworking, the tensions 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." [Emphasis supplied.]

An individual who is seeking to make an occupational stress claim in tort must show that a duty of care was owed to them by their employer, that the duty was breached, and that breach caused or materially contributed to a clinically-recognised psychiatric injury. It is not enough for an employee to show that work became stressful enough to cause psychiatric harm; the employee must show that the psychiatric harm was reasonably foreseeable and that the employer failed to take reasonable steps to prevent the psychiatric harm. It is enough for an employee to show that the employer's failure (or "breach of duty") made a material contribution to the psychiatric harm; it is not necessary to show that the employer's failure was a sole or predominant cause.

Employers owe a duty to their employees to act as a "*reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know*" (*Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776). This was approved as the relevant test in the context of occupation stress claims by the House of Lords in the now historic case of *Barber v Somerset County Council* [2004] 1 WLR 108.

In *Hatton v Sutherland* [2002] 2 All ER 1, Hale LJ set out her practical propositions, endorsed by the House of Lords in *Barber* and which, prior to the pandemic, continued to largely represent the touchstone for these claims.

How do the "practical propositions" apply in a pandemic?

Central to the propositions is the issue of foreseeability and thus the ability to avert impending harm.

In *Hatton v Sutherland*, Hale LJ gave a non-exhaustive list of factors at [43] which are relevant to the assessment of whether psychiatric harm was reasonably foreseeable, including:

1. the nature and extent of the work done;
2. whether the workload was much more than normal for that particular job;
3. whether the work is particularly intellectually or emotionally demanding for the employee;
4. whether the demands of this employee were unreasonable when compared with the demands of others in the same or comparable jobs;
5. whether there are signs that others doing this job are suffering harmful levels of stress;
6. signs from the employee of impending harm to health;
7. whether the employee has a particular problem or vulnerability;
8. whether the employee has previously suffered from illness attributable to stress at work; and
9. whether there is reason to think that any recent and uncharacteristic absences from work might be attributable to stress at work, for example because of complaints or warnings from the employee or others.

With home working and the consequential geographical remoteness from supervisors or managers, the question of what the employer knew or ought to have known about a particular employee's risk of psychiatric injury becomes more complex. Many employees have seen their workload increase to much more than normal for their particular job due to the coronavirus pandemic. Work that may not have been emotionally demanding prior to the coronavirus pandemic may become particularly emotionally demanding when the challenges of working from home are factored in.

Recognised indicators of stress, relevant to foreseeability, may include increased mistakes and the use of more emotional or negative language in emails or telephone conversations. The latter may in fact be more identifiable in a remote working situation, due to increased reliance on those methods of communication. These could be identified by managers as potential indicators, such that reactive follow-up could be implemented.

However, is it enough for an employer to be reactive? Employees may be reluctant to raise mental health issues where face-to-face meetings are not an option. Since the duty on employers is to take "*positive thought for the safety of [their] workers*", employers would do well to ensure that they take proactive, regular steps to gauge how their employees are mentally coping with their work. There are freely accessible online resilience tests, which may be an indicator of an employee's ability to handle stress and adversity. Further, just as remote video conferencing platforms have seen a dramatic take-up for business meetings, they are an equally valuable tool for providing the next best thing to a face-to-face meeting, at which mental wellbeing issues can be specifically raised.

The coronavirus pandemic potentially affects the practical proposition that *"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*" (per Hale LJ, cited at [7] of *Barber v Somerset*). Throughout the pandemic, employees may have been reporting a whole host of "*particular problems*", ranging from the new challenges of working from home with children present; challenges in coping with a greater workload/new methods of work; having to care for other sick, shielding or vulnerable family members; lack of social or in-person contact; and unprecedented mental health challenges arising from the circumstances of the pandemic. What may have been dismissed by a Court as part of the "*normal pressures of the job*" or indeed life prior to the coronavirus pandemic could now potentially be regarded as a foreseeable cause of psychiatric injury.

Hale LJ's "*relevant factors*" as to foreseeability may now at the very least need to be considered against what are understood to be the primary causes of stress arising directly from home working. These may include a lack of structure, too many distractions, difficulty setting boundaries, social isolation, and a lack of focus. An appreciation of these in advance, by both the employer and the employee, would better enable the implementation of strategies to guard against them and to measure whether they are arising.

What about employees who are exposed to COVID-19 at work?

As regards employees whose jobs directly expose them to a risk of contracting COVID-19, how do Hale LJ's "*relevant factors*" as to foreseeability play out? The very nature of many people's work exposes them to an increased risk of contracting COVID-19, whether by reason of poor social distancing measures in the workplace, a lack of suitable PPE or

regular direct contact with people suffering from COVID-19. Importantly, the test of foreseeability of psychiatric injury from employment is the same whatever the employment and there are no occupations which should be regarded as "*intrinsically dangerous to mental health*". For this reason, a Court will not more readily find that an occupational stress claim will succeed, for example, in the context of a Key Worker or a front-line NHS worker but all the circumstances of the employment will be relevant. Causation may become a particularly thorny issue where an employee, making an occupational stress claim, has been exposed to COVID-19 at work: preliminary findings published in the Lancet Psychiatry suggest a correlation between a COVID-19 diagnosis and increased risk of developing a psychiatric disorder.

Has there been any change to what may be "reasonable steps" to seek to avert an impending risk?

If an employer identifies that psychiatric harm to an employee, resulting from stress at work, is reasonably foreseeable, then an employer is only in breach of duty if they fail to take the steps that are reasonable in the circumstances. It is suggested, having regard to the above factors, that given the added stresses caused by the coronavirus pandemic, employers should be particularly attentive to the needs and requests of employees who have informed their employer of a particular problem or vulnerability in the past and to consider if they should take particular steps to prevent psychiatric harm from arising down the line. It should be remembered that whilst an employer is generally entitled to take what they are told by their employee at face value, this is unless there is good reason to think to the contrary (*Barber v Somerset* at [7]).

It is already established that the circumstances relevant to "*reasonable steps*" include the size and scope of the employer's operation, the resources and the demands it faces, the likelihood of the risk of injury to the employee, the gravity of the harm which may occur, the costs and practicability of preventing the harm and the justifications for running the risk.

Whilst the pandemic may well have had a negative impact on the smooth operation of the employer's business such that the focus may be on firefighting to survive, they cannot afford to neglect their obligations, and in particular to respond appropriately where risk of impending harm is identified.

As ever, employers would do well to document what steps were considered and offered to support an employee who raises a complaint of psychiatric harm from stress at work; the costs and practicability of those steps; why those steps were or were not taken; and to review the risk of psychiatric harm to its employee and the steps to be taken in response at regular intervals, in case it becomes reasonable to take additional steps at a later stage.

Just as an employer who implements a confidential advice service for its employees with reasonable help offered, either directly through that service or through referral to other services, may demonstrate reasonable steps were taken, directing an employee to relevant online resources including from Public Health England and the Mental Health Foundation may further assist in this regard. However, these steps whether offered alone or together should not be seen as a panacea. They would need to be followed up by an identification of the particular causes of stress and the implementation of measures to remove or reduce them if practicable.

For those for whom the indications of impending harm is consequent upon concerns about occupational exposure to Covid-19, taking reasonable steps will likely focus on what can be done on things such as informal education/advice as to the actual as opposed to the perceived risk, offering appropriate reassurance and advice about risk minimisation and, if necessary, the implementation of additional steps to allay legitimate areas of concern. For those who have a particular vulnerability (whether due to age, underlying health conditions or otherwise) such that the consequences of contracting the virus would be considerably more serious than for the average person, consideration may need to be given to additional protective measures or even re-deployment to a less exposed role.

Conclusion

We believe that whilst Hale LJ's practical propositions in *Hatton v Sutherland* will continue to be the touchstone in occupational stress claims, they will need to be carefully interpreted and applied in the context of working during the coronavirus pandemic. It goes without saying that we are in unprecedented territory and this is likely to make it more

difficult than ever to predict how a Court will determine issues such as whether psychiatric harm was on the particular facts reasonably foreseeable and whether reasonable steps were taken in light of all the circumstances faced by both employer and employee. We believe there are now a plethora of previously unconsidered circumstances and factors that are likely to be relevant to the outcome of occupational stress claims, all of which will need to be given careful consideration by those experienced in advising in this area.