Employment

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Stressed out

Stress in the workplace is a fertile source of litigation, say **Michael Salter** and **Chris Bryden**

IN BRIEF

- It is essential that employers are advised that stress at work symptoms should be taken seriously and all necessary referrals are made and, importantly, followed up.

According to the Labour Force Survey, in 2007–08 an estimated 442 000 workers in the UK believed that they were experiencing work-related stress, at a level that was making them ill.

In the recent case of *Dickens v O2 plc* [2008] EWCA Civ 1144, [2008] All ER (D) 154 (Oct) the Court of Appeal has given further consideration as to the interpretation and implementation of the guidelines set out in the case of *Hatton v Sunderland* [2002] ICR 613 as endorsed by the House of Lords in *Barber v Somerset County Council* [2004] ICR 457.

Dickens makes it clear that the obiter *Hatton* guidelines must be taken in the context of the case and not applied out of context to contort a case out of recognition.

Susan Dickens worked for O2 between 1991 and 2002, originally as a secretary and latterly as a regulatory finance manager. Ms Dickens had suffered a breakdown in her health in 2002, which led to the award by HHJ Corrie sitting at Slough County Court, of the sum of £109,754.22 (inclusive of interest) for psychiatric injury negligently caused by excessive stress.

Following her promotion in 2000 to the position of finance and regulatory manager Ms Dickens began to struggle with the pressures of her new role. She had a minor crisis at work in late 2000 and in her annual review in March 2001 it was noted that the preparation for the audit that year "had taken its toll on her". Ms Dickens then applied internally for a similar role, entailing similar audit work. She began this job in August 2001.

At that time Ms Dickens was undergoing counselling, as she had developed irritable bowel syndrome and it was possible that it was stress-related. The immediate supervisor of the new role was moved on at the end of 2001 and Ms Dickens therefore had to cope with the 2002 audit on her own, working long hours and exhausting herself.

Exhaustion

In April 2002 Ms Dickens informed her line manager that she was exhausted and wanted a six-month sabbatical as she felt drained of energy. Ms Dickens repeated this at her appraisal at the end of May 2002 and it was agreed that she would be referred to occupational health. This referral was not acted upon and in June 2002 Ms Dickens became unable to work. Her employment was terminated in November 2003 and she commenced her action for damages in June 2005.

The judge at first instance found that O2 had breached its duty to Ms Dickens, essentially by not acting on the conversation in April 2002, by a referral to occupational health and by sending Ms Dickens home.

Balance of probabilities

The judge found that on the balance of probabilities, Ms Dickens was "at the very least, deprived of the chance of a swift recovery from her psychiatric illness if it had already by then started but, more likely deprived of the chance of not plummeting to the depths to which she subsequently did".

O2 appealed on a number of grounds. Lady Justice Smith, giving the leading judgment, dismissed the appeal. The judgment is neatly divided into four topics of appeal: reasonable foreseeability, breach of duty, causation and factual findings, the latter of which does not require examination.

Reasonable forseeability

O2 contended that the judge had erred

by misunderstanding the relevant test relating to foreseeability of harm. It contended that the guidance of Lady Justice Hale (as she then was) in *Hatton* "to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health" had not been properly followed. *Hatton* goes on to state that "the indications must be plain enough for any reasonable employer to realise that he should do something about it".

This aspect of the guidance from *Hatton* is relatively uncontroversial, and provides an objective test: that of a reasonable employer realising that the indications that stress is tipping over into harm to health. This is a relatively high threshold, but will usually be a question of fact, and it is unsurprising that the Court of Appeal did not see fit to interfere with the finding of the judge below.

Breach of duty

The judgment in *Dickens* is more interesting however for its commentary on breach of duty.

Hatton made clear that an employer who offers a confidential counselling service is unlikely to be held in breach of duty (though it should be noted that not offering such a counselling service to an employee where it exists may amount to a breach of duty: see *Melville v Home Office* [2005] EWCA 5). The rationale for such a service is that an employee may not be willing to enter discussions with their line manager, through fear of damaging their reputation and promotion prospects.

It was argued on behalf of O2 that as it did provide such a service, it could not be held to be in breach of duty. However, in Ms Dickens' case, she did raise her concerns with her line manager. Smith LJ noted that the existence of such cases does not operate as a panacea discharging the duty of care in all cases: see *Daw v Intel Corporation* [2007] ICR 1318.

Smith LJ went on to warn that, in the circumstances, "how dangerous it is to apply guidance given by the court as though it were a statutory provision". This merely serves to underline that the reference in *Hatton* to counselling services should not be taken out of context.

O2 also submitted that the *Hatton* guidance emphasised that the employee was the person best placed to decide whether to continue working , and that therefore the judge should not have found a breach of duty for failure to respond to the request of Ms Dickens for a six-month sabbatical. It was up to Ms Dickens, it was submitted, to decide to take sick leave. Smith LJ understandably dismissed this ground, curtly commenting that counsel for the appellant, "has taken brief passages from the judgment in *Hatton* quite out of context".

Causation

The third topic of appeal concerned causation. *Hatton* makes it clear that a court must determine not just a breach of duty, but that that breach caused the harm: "It is necessary to show that the particular breach of duty found caused the harm, it is not enough to show that occupational stress caused the harm…however, the employee does not have to show that the breach of duty was the whole cause of his ill health: it is enough to show that it made a material contribution."

> "It is not a set of rules which can be separated from context and applied individually to all cases"

While gently noting that the judge at first instance had not in fact applied the correct test of causation, instead referring to concepts of "loss of a chance", the Court of Appeal found that reading the judgment as a whole it was inevitable that the identified breach had made a material contribution to the illness. Smith LJ noted that in *Hatton* it was stated that causation could be established by showing that the tort made a material contribution, which presupposed non-tortious factors in play. Thus a claimant can succeed on causation even if the "causative potency" of the tort cannot be demonstrated.

Apportionment

Dealing with the question of apportionment, Smith LJ (obiter) disagreed with the (also obiter) comments of Hale LJ in *Hatton* with regard to apportionment. Rather than an attempt at apportionment, Smith LJ expressed a provisional view that damages should not simply be apportioned across the board where a tort has made a material but not scientifically-quantifiable contribution. On this basis it may therefore be that damages can simply be recovered from the tortfeasor employer in such cases.

It is clear from the *Dickens* decision that the Court of Appeal considers the *Hatton* guidance to be simply that: it is not a set of rules which can be separated from context and applied individually to all cases. Stress at work claims will still turn on their individual facts, and *Hatton* provides no more than a framework within which courts will be guided.

To assume baldly that the existence of counselling services, for example, means that breach of duty cannot be established is simply incorrect; and employers must pay attention to requests by employees for time off or sabbaticals, rather than just notification of sick leave.

It is essential that employers are advised that stress at work symptoms should be taken seriously and all necessary referrals are made and, importantly, followed up. Until the question of apportionment is clearly established, it should also be noted that employers may not be able to rely on a reduction in awards of damages in stress at work cases. NLJ

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