West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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Work Related Stress and Injury - How Foreseeable is Foreseeable?

We continue our theme on illness related dismissals but this time focusing on the area of stress in the High Court case of *Easton v B&Q Plc*. This case raises some challenging questions over the extent to which an employer should be able to identify and recognise the impact of work upon an employee who had been absent from work due to depression and following his return suffered a relapse. The case turned on the extent to which the employer was liable for the relapse as a result of the actions they took, or didn't take, in light of the foreseeability of the consequences. The evidence is lengthy and we invite you to form your own views!

Background

Easton was hugely ambitious. In 2001, he was head-hunted by B&Q to manage one of their stores, moving in 2007 to manage the Romford store, due to a large refurbishment being required. Easton benefitted handsomely with a salary by this time of £105,000 including bonuses. A happy tale you may think but Easton's career ambitions became frustrated by his concerns over a lack of promotion to the level beyond store manager. In 2010 Easton was diagnosed with depression. He tried to return to work in both September 2010 and January 2012 but could not get back. The crux of his subsequent claim, was that his initial illness was occupational stress which was caused by statutory negligence or breach of duty from B&Q and furthermore, that following his return to work he felt B&Q failed to protect him against a further relapse of illness and so the case unfolds...

The High Court

We are going to jump straight to the High Court case as this is where the real substance happened. B&Q acknowledged that Easton had suffered a psychiatric illness that was of a significant nature and accepted that a large proportion of it was occupational stress. What they did not accept was that this illness was foreseeable at any stage. They therefore denied breaching any duty of care to Easton.

Easton's stress was caused by a lack of promotion which he felt that he had been promised on numerous occasions by his employer. When a change of management came in, (a gentleman called France), France stated that Easton had to prove himself to him and Easton felt he had proved himself enough and there was

"never ... any intention of advancing [him] in [his] career and that [he] was being exploited. At this point [he] felt very dejected".

Easton felt that his employer was in breach of their duty by failing to heed his excellent work record and requiring him to prove himself again. It was fair to say Easton had strong appraisals and was identified as having 'further potential'. Easton had made the comment in his appraisal that he "[Needed] to understand why [he had] been overlooked/not successful in the last 12 months for a next step opportunity and [would] work towards achieving this goal".

The Court on this issue felt that it was in fact Easton who had persuaded *himself* in 2009 that a promotion was on the cards, hence the note he put on his appraisal but the Court identified that they did not see anything as a "a clear promise" of promotion.

The court acknowledged that in March 2010 he was told that he "will make the next level **if [he] continue[s] to deliver results**" but they felt that the appraisal system and training and development system adopted by B & Q therefore kept Easton fully informed as to the true position.

The Court concluded that there was no breach of duty by the relevant B & Q managers with regard to any failure to discuss his promotion prospects. However, despite this, it was not necessary for Easton to show that the breach of duty was the whole cause of the illness. If work related stress which was the result of a breach of duty made a material contribution that will be sufficient to find liability. Therefore whilst his perception in relation to promotion was described by the Court as "wholly skewed", it remained a relevant consideration when assessing his evidence generally. Not unreasonable so far but do read on!

Work related stress – the May 2010 breakdown

Easton experienced a breakdown which he identified was for a number of reasons. There was evidence put forward that demonstrated that the change of system in relation to restocking the store had created some problems, exacerbated by the fact that a removal of the night shift (which he objected to) was a pressure, but the court felt that the evidence did not support Easton's contention that the situation deteriorated in 2010 as stock levels increased. The court felt that that the effect of the removal of night staff was nothing like as dramatic as had been painted by Mr Easton and nothing like the 40% increase in his working hours he portrayed. Whilst it was a significant change in working practice, its introduction did not (in the court's view) involve any breach of duty on the part of B & Q.

However, the Court added that *"it may be a pointer to a more significant question, namely did Mr Easton tell Mr Hughes* [the manager] *about later problems he was experiencing in the period leading up to his initial illness? I am satisfied that Mr Easton was happy to accept the change in the system".* Furthermore, the Judge concluded *"I am satisfied that Mr Easton did not complain about the effects of the removal of the night staff (as he now alleges them to have been). That was for the same reason as his initial agreement with the removal of those staff".*

Easton also complained that he was exposed to excessive stress when Trade Point was introduced in the Romford store. This was an initiative that B & Q introduced in 2010 as a means of attracting tradesmen into their stores for the kind of business previously done by traditional builders' merchants and other trade outlets. As Romford could not accommodate the space this project resulted in a significant building renovation. Easton felt that the way it was introduced imposed excessive and foreseeable stress on him because he asked for it to be postponed because it would coincide with the influx of seasonal stock and the busiest period of trading for the store. The court concluded that Easton probably did express some concerns about Trade Point but not in a way that would suggest that stress was discussed. In fact in his appraisal he did not mention these concerns at all. The court, whilst satisfied that the construction of Trade Point caused considerable disruption felt that Easton said nothing to Hughes (his manager) which could have suggested that he was "struggling and needed help". The court were not surprised by this given Easton's ambitions. Therefore the court did not come to a conclusion that Easton gave a "cry for help" which he alleged. If anything when Easton did ask Hughes for help, there was evidence that he was supported.

Easton's last day at work before he was diagnosed with depression caused by work related stress was 2nd May 2010. On that day Herrett and Phillips (a director of B & Q) made an unannounced visit to the Romford store. They witnessed the store was poorly set up with shelves empty, so Easton and Herrett went onto the mezzanine floor to have a private conversation, and at that meeting Easton broke down in tears once he was alone with Herrett, at which point Easton explained the issues he was experiencing. Hughes after speaking to Herrett contacted Mr Easton to tell him to go home.

The return to work and the further breakdown

Easton was away from work for just 5 months. He was treated with anti-depressants. He consulted a psychotherapist.

B & Q deal with occupational health issues through an independent healthcare company called Cigna. The Cigna case manager in respect of Easton was Lennon.

In September 2010 Lennon reported in writing on Easton. The report said that the dosage of Mr Easton's medication more recently had been reviewed and increased since which he slowly had begun to recover and that he was receiving treatment from health professionals. A phased return to work was recommended. Easton began his phased return to work at a B & Q store in Ipswich. Ipswich was close to Mr Easton's home address. It was a less busy store than Romford. He now reported to Black, and Black had been made aware of the circumstances of and reasons for Mr Easton's long absence from work. The phased return was agreed in the terms as set out in the example given in the report from Lennon with the first day being in the week commencing 27th September 2010.

In his witness statement, Easton said that he did not feel mentally prepared for a return to work but he decided to do so because of his financial situation, but at the hearing he said he wanted to go back to work and that he felt ready to return. On 7th October 2010 (the fourth day of Mr Easton's return to work) Black decided to offer Easton a vacancy (short term) in Belvedere (in Kent!) Easton did not want to do the drive and a dispute arose. On this issue the Judge drew some significance from the inconsistency in Easton's evidence at two different points in time, concluding;

"I am satisfied that Mr Easton's oral evidence represents his subjective state of mind as it was on the 22nd September 2010. Mr Easton also gave oral evidence to the effect that he had said that he did not wish to work towards London in the future, the journey up the A12 being part of his decision. He gave no indication of when he said this or to whom. I heard no other evidence to suggest that Mr Easton gave this indication. This may have been what was in Mr Easton's mind. I am satisfied that he did not mention it to anyone else and certainly not to Mr Black. Had he done so, the events of the 7th October 2010 would not have occurred"

During the conversation Easton had raised the question of sickness and that no additional sick pay would be paid to him. It was claimed that the company had promised to pay Easton additional sick pay beyond the contractual entitlement i.e. that his "full pay would be backdated". The court was not convinced the conversation took place.

Before the Court, referring to the transfer, Easton stated;

"*…I was very much pressured and bullied by Craig Black into accepting…the Belvedere store. I was asked repeatedly whether I would like to accept the store and [was] pushed continually to accept it".*

He felt that B & Q were trying to force him to resign. Black denied the suggestion that he had pressured or bullied Easton. He said that he did no more than put the option in front of Mr Easton with the onus being on Mr Easton to say yes or no as he chose. The Court referred to a 'long term absence log" which contained a note (by Black) which read; *"Craig had discussion with Karl reference covering Belvedere store for 6-8 weeks…Karl was not keen on the idea. He was asked to think about it and come back to Craig with a yes or no to doing this".* and overall reached a conclusion that the meeting occurred in the manner described by Mr Black.

Easton went to his G.P. on the 8th October 2010 who re-certified him as unfit for work due to depression. There was a further attempted return to work in early 2012 but this failed. Easton underwent a grievance procedure and an appeal, both at which he was unsuccessful.

Risk Assessment

Easton claimed there was a lack of stress risk assessment carried out. He agreed that, when he was employed, he was given a copy of the staff handbook. This contained a section entitled "Stress Management". The relevant part read as follows: *"If you are experiencing problems which are causing you to feel stressed at work or affecting your performance, you have a responsibility to talk to your Manager. If managers are not aware that there is a problem, they will not be able to help"*.

Easton stated that he had not had time to read it. The Policy document identified that stress could lead to mental illness such as depression. The senior managers and directors of B & Q who gave evidence were asked if there were any risk assessments carried out in relation to stress. B&Q accepted that no assessment of the risk of stress to employees arising from the disruption involved in Trade Point was carried out and B & Q did not run training courses in stress awareness.

The guidance from the HSE on assessment of risk in respect of stress essentially was as follows:

- Identify the particular stress risk factors applicable to the relevant workplace.
- Decide who might be harmed and how.
- Evaluate the risks.
- Develop and implement action plans to deal with the risks found.
- Monitor and review the actions plans as they are operated.

The Law

The leading authority on claims by employees for damages in respect of psychiatric injury caused by stress in the workplace remains *Hatton v Sutherland.* Key excerpts are as follows:

"(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors)...

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. 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

(5) Factors likely to be relevant in answering the threshold question include:

(a) 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 particularly 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?

(b) 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?

(6) 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 or seek permission to make further enquiries of his medical advisers...

(11) 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...

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event."

In addition the Court looked at the case of *MacLennan v Hartford Europe* EWHC/QB/2012 which summarised the above as;

"First, it is insufficient for a claimant to show that his employer knew or ought to have known that he had too much work to do, or even to show that he was vulnerable to stress as a result of overwork. To succeed, he must show that his employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm in terms of a psychiatric or other medical condition"

In making is claim, Easton relied upon the provisions of Section 3 of the Management of Health and Safety at Work Regulations 1999;

(1) Every employer shall make a suitable and sufficient assessment of –

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.

(3) Any assessment such as is referred to in paragraph (1) or (2) shall be reviewed by the employer or self-employed person who made it if -

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the matters to which it relates; and where as a result of any such review changes to an assessment are required, the employer or self-employed person concerned shall make them.

High Court Conclusions

The court felt that Easton's case failed in respect of his first breakdown .He 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 any clue that he might succumb to a psychiatric illness. All of those who knew him well within B & Q had no idea that he might do so. It was therefore clear in the view of the Court that the foreseeability threshold in respect of the first breakdown cannot begin to be surmounted on any view of the evidence. Hughes with his 10 or more years' experience of regional management with B & Q was unaware of any other store manager developing work related stress and consequent illness save for one manager whose illness was more related to personal issues than his work. Thus, not only was there nothing about Mr Easton which put anyone on notice that he might suffer psychiatric illness, but also there was nothing about store managers in general giving rise to foresight of such a risk.

They accepted that the relapse suffered by Easton meant B&Q now knew that he had suffered a psychiatric illness.

The Court felt that the fact he was still taking medication was 'hardly determinative as to how his future employment should have been handled as many people handle demanding jobs on medication'. However, the court did highlight that following the first period of stress related illness that *"B & Q were on notice that Mr Easton was vulnerable"*.

Black's offer of a different posting in the court's view was not sufficient to mean that making the offer was a breach of the duty of care owed to Mr Easton. The approach taken by Mr Black was considered a reasonable one. If Black had pressured and bullied Easton and/or if the offer had been made on the basis that it was the only alternative, this would have been different.

The court went on to say that breaches of duty and causation only arise if it is accepted that the psychiatric illness following the events of the 7th October 2010 was foreseeable. The decisions reads;

"In the sense that Mr Easton was at risk of psychiatric illness, there was a foreseeable risk. But the issue of foreseeability goes further than that. The employer must know or the employer ought to have known that as a result of stress at work there was a risk of psychiatric illness.

In relation to the relapse that would require foresight that offering Mr Easton the temporary post at Belvedere would cause a recurrence of the psychiatric illness."

and

"if the employer is aware of some vulnerability, the employer inevitably will be liable for any psychiatric illness then suffered by the employee due to some act of the employer. I have concluded that B & Q were not in breach of duty by reason of the approach taken by Mr Black so my conclusion on foreseeability is not decisive. In fact, I consider that Mr Black's approach did not give rise to a risk of psychiatric injury of which he knew or ought to have known"

On the issue of risk assessment the court were satisfied that, had a general risk assessment been conducted, no general risk of psychiatric injury would have been uncovered.

The working environment of B & Q was pressured but no more than many other similar organisations. As already noted there was simply no history in B & Q of store managers suffering from psychiatric illness. They felt that even if a proper risk assessment had been done Easton, should have informed his Managers that he was suffering from symptoms in accordance with the policy (referring to a B & Q document entitled "Managing Pressure and Stress – Employees' Booklet" there was a section headed "Identifying Signs of Stress in Yourself"). All in all the claim failed.

Where to begin? Whilst legal commentators on this case have, as with the High Court, focused their attention on the legal analysis of 'foreseeability', it is difficult to reconcile how B&Q could win a 'not foreseeable' argument when Easton, despite being signed fit to return, had recently suffered a breakdown and was on continuing medication for it. Similarly, to not envisage that 4 days into a structured return from a period of absence due to work related stress, discussing a short term transfer with an employee would not require a much more in depth consideration than appears to have happened in this case.

In raising questions about the decision we are drawn back to the *Hatton* judgment and in particular point 5(b) (see above), which in assessing whether the foreseeability threshold has been met, amongst other factors, refers to;

"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"

We will leave you to reach your own conclusions.

It is also clear from the law that organisations are best protected if they;

- **Become stress aware**
- **Help employees recognise and report stress**
- **Conduct a risk assessment for stress**
- **Ensure managers can spot early warning signs**
- **Have a robust policy on reporting and availability of confidential support**

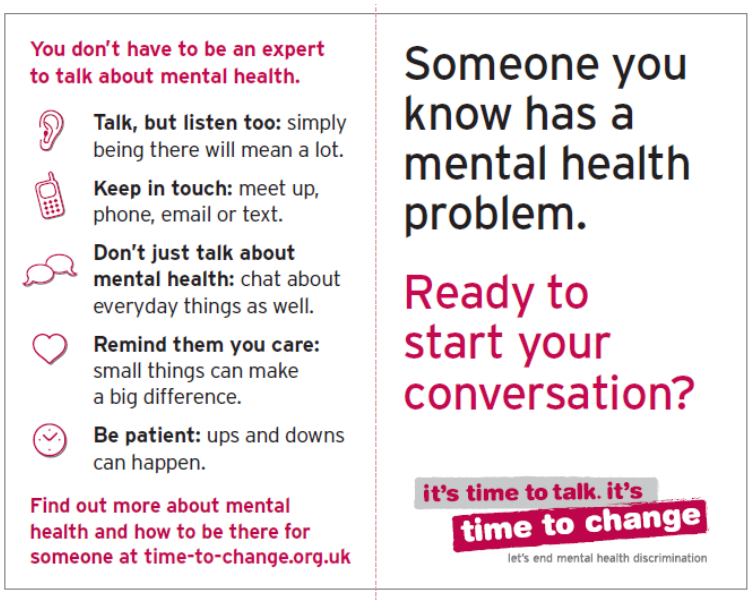
The Health and Safety Executive have a comprehensive set of management standards on work related stress - see http://www.hse.gov.uk/stress/standards/

In the SPOTLIGHT

IS IT 'TIME TO CHANGE?'

'Time to change' is an initiative that was launched in 2009 through the main mental health charities with the objective of improving the lives of people with mental health conditions. It has recently widened its campaign through creating a pledge that the public can sign up to in order to commit to helping this worthy cause. So far, over 80,000 people have signed the petition to pledge to end mental health stigma. The campaign focuses on improving strategies to challenge perceptions about mental health and encourages those that sign up to think about giving much needed support to those that need it.

The importance of providing people with the avenue to talk about their problems is a key focus of the project. Their website gives the simple analogy that if your friend had a broken leg and just came out of hospital you would not think twice about asking them if they are ok, yet people do worry when it comes to mental health. It also stresses the reality that professional help is only one strategy to help people suffering from mental health issues recover. No one needs to be an expert to ask how someone is or show compassion, just being there is a big comfort for those who are suffering who often feel isolated. The time to change campaign offers some useful tips in its business card printable document designed to carry around with you to remind you how to react should you find yourself in this situation.



Yet is it that easy at work to do some of these things? There are a number of immediate concerns that Managers may have:

- I don't have that sort of relationship with my staff
- I don't like/am embarrassed to discuss personal stuff with staff as I don't talk about myself in that way
- What if I offend? What if I say something that leads to a complaint about me?

- They are perhaps sick of people asking them if they are ok and may think I am interfering
- I have competing priorities and this could eat into my time
- What if the person never returns and I need to keep professional distance to protect the organisation, I don't want to be seen as disingenuous?

It is our belief that **Prevention, Intervention and Action** are key to helping staff stay healthy or where they can't, recover more easily.

At the end of the workshop managers will have:

- developed a knowledge and understanding of what stress is and how to identify the signs of stress in employees,
- gained an overview of mild and severe mental health conditions,
- an understanding of the business case for why organisations should invest in employee wellbeing,
- an understanding of their legal role and responsibility in respect of managing workplace stress and responding to employees with stress or mental health conditions,
- a clear understanding of the manager competencies required to prevent and better manage stress at work,
- a simple framework to conduct a preventative 'team stress/wellbeing risk assessment' with their own or another team,
- soft skills to conduct a 'reactive stress/wellbeing risk assessment' with an individual member of staff and monitor their ongoing performance, and
- an ability to effectively signpost employees to sources of support and encourage their use.

Is it a time to change? For more information, please visit:

http://www.wmemployers.org.uk/managingmentalhealth

One Direction Split Leads to Compassionate Leave Requests

Some of the team remember Take That splitting vividly (and it was a stressful time) but Zayn Malik's announcement of his split from One Direction didn't just leave fans crying into their posters, it left 480 people in the UK contacting their employer requesting compassionate leave.

Alan Price, employment law director at Peninsula, commented

"If employees feel strongly about the issue then request that they take days off as a holiday, but compassionate leave is what you allow if a close relative dies, unless the employer is unaware of family ties with Zayn Malik then I hardly think that this qualifies. Abusing compassionate leave is inconsiderate to fellow colleagues who may genuinely need the time off."

We wonder how many calls Jeremy Clarkson got?