

STRESS AT WORK CLAIMS IN THE EMPLOYMENT TRIBUNAL AND CIVIL COURTS



INTRODUCTION



Nick Brown

Chair

Nick specialises in the fields of clinical negligence, legal negligence, personal injury and human rights, in particular, deaths in custody and other actions against the police and the prison service.



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Lameesa is a specialist employment, discrimination, and equality law barrister.



Michael Spencer

Michael has a broad public law and civil law damages practice, with a particular focus on human rights, personal injury and actions against public authorities. Michael has significant experience of employers' liability claims, on behalf of both claimants and defendants, including stress at work claims.



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Cormac practises in employment, discrimination, collective labour law, and housing.

Cause of action

Employment Tribunal	County/High Court
<p>Discrimination</p> <p>Whistleblowing (<u><i>Virgo Fidelis Senior School v Boyle</i></u> [2004] ICR 1210)</p> <p>Other detriments (s.49(2) ERA)</p> <p>Trade Union detriment (arguably...compare s.49(2) ERA with s.149(2) TULRCA 1992)</p> <p>NOT unfair dismissal (<u><i>Dunnachie v Kingston upon Hull City Council</i></u> [2003] IRLR 394)</p>	<p>Negligence/Breach of contract (<u><i>Hatton v. Sutherland</i></u> [2002] PIQR P21)</p> <p>Protection from Harassment (s3 Protection from Harassment Act 1997)</p>

Elements of the Claim

Employment Tribunal

You would need to show

- (1) The 'ingredients' of a successful discrimination/whistleblowing/ detriment claim
- (2) The requisite causal link between the statutory tort and the personal injury: see *Ahsan v Labour Party* UKEAT/0211/10/ZT

County/High Court

The goal is to recover damages for personal injury. You would need to show the 3 elements of a claim in Contract/Negligence:

- (1) A duty to take care
- (2) Breach of duty: a failure to take the care which can reasonably be expected in the circumstances
- (3) Damage in the form of actual psychiatric injury as a result of that failure to take care
(Lady Hale's judgment in *Hatton v. Sutherland* [2002] PIQR P21)

The Duty of Care

- Single test: whether a harmful reaction to the pressures of the workplace is **reasonably foreseeable** in the individual employee.
- Depends on the interrelationship between the **particular characteristics** of employee and the **particular demands** the employer casts upon him.
- The indications that an employee will or may go over the edge from stress to injury to health must be plain enough for any **reasonable employer** to realise that they should be doing something about it.
- Same approach applies where there is a **single one-off act of unfairness** (e.g. disciplinary sanction) - Yapp v FCO [2014] EWCA Civ 1512

Breach of Duty

- A breach of duty is a failure to take the care which can **reasonably be expected in the circumstances**.
- What is reasonable depends upon the foreseeability of harm, the magnitude of the risk of that harm occurring, the gravity of the harm which may take place, the cost and practicability of preventing it, and the justifications for running the risk.
- It is necessary to consider what the employer not only could but should have done, taking into account **the size and scope of the operation**.
- Where there is an offer of confidential counselling, breach is unlikely.
- No breach if the only reasonable and effective step would have been to dismiss employee.

Causation of Actual Psychiatric Injury

- You have to show that the particular breach or breaches of duty you establish caused **actual psychiatric injury**.
- In many cases, the claimant will have a **pre-existing vulnerability**.
- Where the employer's breach of duty has only exacerbated a pre-existing disorder or accelerated the effect of pre-existing vulnerability, the award of general damages for pain, suffering and loss of amenity will reflect only the exacerbation or acceleration. So, too, will quantification of the claimant's claim for financial losses.
 - Approach approved in *BAE Systems v Konzcak* [2017] EWCA Civ 1188.

Harassment

A course of conduct which:

- (i) occurs on at least two occasions,
 - (ii) is targeted at the claimant,
 - (iii) is calculated in an objective sense to cause alarm or distress, and
 - (iv) is objectively judged to be oppressive and unacceptable (rather than just unattractive or unreasonable).
- Protection from Harassment Act 1997, s3
 - *Dowson v Chief Constable of Northumbria* [2009] EWHC 907 (QB).
 - Vicarious liability – did the conduct take place in the course of employment? (*Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34).

Limitation

Employment Tribunal	County/High Court
<p data-bbox="588 619 807 661">3 months.</p> <p data-bbox="208 746 1189 858">Equality Act claims are normally the 'hook' so extension of time = 'just and equitable'</p> <p data-bbox="186 933 1212 1045">cf. time limits for claims under ERA or TULRCA = not reasonably practicable</p>	<p data-bbox="1651 619 2040 661">3 years/Discretion</p> <p data-bbox="1480 746 2209 788">Sections 11, 14 and 33 of LA 1980</p> <p data-bbox="1342 872 2351 983">Date cause of action accrued – difficulty where there is a continuous course of conduct.</p> <p data-bbox="1360 1062 2333 1173">Relevance of date of knowledge of injury and attribution to work.</p> <p data-bbox="1332 1252 2359 1293">Service of claim form within 4 months (CPR 7.5)</p>

Issuing a claim

Employment Tribunal

How to plead the claim

How to plead the PI element

What needs to be included in the early POC and clarified at a case management PH

County/High Court

High Court vs County Court is dependent on value

You need a statement of value and allocation to either the fast track or the multi-track

Pre-action Protocol for PI Claims

Evidence required

Employment Tribunal

Lower evidential threshold.

The ET may award compensation without any medical evidence (*Hampshire CC v Wyatt* EAT 0013/16) although medical evidence is advisable where there are issues of causation and prognosis (*BAE Systems v Konczak* [2018] ICR 1).

County/High Court

Need expert evidence from a consultant psychiatrist on causation, condition, and prognosis to plead the case and plead a Schedule of Special Damages and Future Loss.

(CPR PD 16 para 4)

Amending a claim

Employment Tribunal

Go about it in the usual manner- *Selkent Bus Co Ltd v Moore* [1996] ICR 836

Focus is on the balance of injustice and hardship in allowing amendment (*Vaughan v Modality Partnership* [2020] 11 WLUK 501)

Seeking to amend a claim to include a PI element at a late stage in proceedings will be very prejudicial to R

County/High Court

Values in a Schedule of Loss can be provisional – directions will allow for final valuations at a late stage in proceedings.

Quantum may need to be revised on exchange of expert reports.

Application to amend statement of value relatively easy.

But harder to amend Particulars of Claim (e.g. if D discloses further relevant evidence of negligence).

Costs and Remedies

Employment Tribunal

Parties pay their own costs cf. r.76 ET Rules

C will pay for their own medical report.

Unlikely to recover costs, but overall cheaper.

Financial value of remedies = in principle the same,
but ET less familiar with quantum in PI claims

County/High Court

Qualified One-Way Costs Shifting (QOCS) provides
some costs protection – but beware fundamental
dishonesty

Conditional Fee Agreements (CFAs)

Financial value of remedies tends to be higher

In summary:

Employment Tribunal

- A PI claim can only attach to certain causes of action
 - You would run those cases as you usually would, requiring the same evidential threshold
- Usual position re limitation (3 months) and costs
- Can sometimes separate out remedy from liability...consider at what stage you should seek evidence on prognosis

County/High Court

- May be better for higher value claims or where focus is more on the PI aspect
- Need to establish negligence (i.e. foreseeability) and/or harassment (i.e. course of conduct)
 - Longer limitation period (3 years)
 - Costs protection through QOCS
 - Lengthy litigation, slower process

Case Study A- scenario

- Client (A) is an experienced manager in the high pressured sales team of a small firm.
- In his initial health questionnaire, A discloses no mental or physical health issues.
- In the pub one day after work, A tells his manager (M) that he sees a therapist because he *“gets really down sometimes.”*
- A member of A’s team (P) files a grievance alleging they were bullied by A.
- The grievance takes two years to resolve, because of staffing shortages. A is interviewed but told nothing else about the process.
- After the interview, A is signed off work with depression and anxiety.
- The grievance eventually concludes that A has no case to answer.
- A has phased return, but with shorter hours and less commission.



Case Study A- issues

- Foreseeability: was the mention of therapy enough to give rise to a DOC?
- Breach of duty: consider size of organisation, experience of the manager, reasons for the delay.
- Would it have been reasonable to have expected the company to employ HR staff or consultants?
- Did the grievance more than minimally contribute to, exacerbate or accelerate A's anxiety and depression? - need expert evidence.
- Consider consequential losses, e.g. loss of commission.



Case Study B- scenario

- Client (B) is a trainee solicitor in the personal injury team of a large law firm.
- Her first supervisor (S) is renowned for being “tough” and expects his trainees to work long hours.
- On the night before a trial, S photocopies the wrong trial bundle. S calls her a “*fucking moron.*”
- After another difficult trial, S tells B she’s “*hopeless*” and will never qualify as a solicitor.
- B is found crying in the toilets by another partner (P). B confides in P that she can’t cope with S’s conduct. P tells her to “*man up.*”
- B is forwarded a meme sent round the junior associate Whatsapp group implying she is “*slow.*”
- A month later, B is signed off with work-related stress.
- After a period on sick leave, B eventually qualifies into another team.



Case Study B- issues

- Foreseeability: Crying in the toilet. Any prior disclosure of vulnerability?
- Breach of duty: would a reasonable employer have done more to reduce stress?
- Harassment: course of oppressive and unacceptable behaviour?
- Vicarious liability? Were staff acting in the course of employment?
- Psychiatric injury? Damages for distress? Financial losses?



Case Study C- Scenario

- Client (C) is a senior accountant in a large firm.
- C has joined the firm a year ago and her initial appraisal said that she “exceeded expectations”.
- 6 months into the role, some of C’s colleagues begin to complain that she is difficult to work with. In particular, they say she misses deadlines and can be “abrasive” when communicating with people. Based on this feedback, at C’s next appraisal she is considered to “meet expectations”, which means that she is not entitled to the highest level of bonus.
- C has two male counterparts in her team, both of whom are given “exceeds expectations” appraisals and receive the highest level of bonus.
- C is signed off with work-related stress. She says her GP has diagnosed her with anxiety and depression, however, she refuses to disclose any medical records to her employer.
- C refuses to correspond with her employer, as she says this exacerbates the stress. C’s employer continues to correspond with her by letter, stating that it has a duty to manage her sickness absence.
- After C has been off work for eleven months, her employer decides to dismiss her for capability reasons.
- C believes that she will never be able to work again due to the employer’s treatment.



Case Study C- issues

- Does C have an arguable sex discrimination claim? There is insufficient evidence for a direct discrimination claim as the bare fact of a difference in treatment between C and her male colleagues will be insufficient to shift the burden of proof (*Madarassy v Nomura International plc* [2007] ICR 867).
- Does C have an arguable disability discrimination claim in respect of employer continuing to correspond with her and/or dismissal?
 - Is C disabled?
 - There is a distinction between a mental impairment within the meaning of s.6 EA and low mood and anxiety which is simply a “reaction to adverse life events” (*J v DLA Piper UK LLP* [2010] ICR 1052).
 - “Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise...are not of themselves mental impairments” (*Herry v Dudley Metropolitan Council* [2017] ICR 610).
 - Refusal to disclose medical evidence to employer: actual/constructive knowledge?
 - “Long term”: how long the impairment is likely to last is to be determined at the date of the discriminatory act (*McDougall v Richmond Adult Community College* [2008] ICR 431).
- C might want to bring an unfair dismissal claim but will not be able to recover in respect of personal injury. In any event, unfair dismissal claim weak on these facts.



Thank you for listening.

Any questions?

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