WALKING THE TIGHT ROPE

Stressed employees or genuinely injured Claimants?

Cases where employers face claims predicated on stress at work naturally bear certain similarities. One trait, which seems to permeate in a number of cases is that of an employee who having taken umbrage with a decision or act carried on the behalf of their employer becomes so entrenched in their opposition to such a decision, that their reaction begins to develop into a recognised psychiatric disorder, or to affect their health in other ways. It's a difficult position for any employer to be placed in. On one hand, an employer is entitled to pursue its genuine commercial interests but at the same time, must balance this against its duty of care owed to its employees. This is particularly true in cases where employees suffering from significant stress react emotionally, perhaps even obstructively to genuinely commercial motivated decisions. In these cases, a cross roads is reached where an employer has to decide on how to proceed, do they accommodate the obstructive employee, or push on fearing the threat of legal action for the greater good of their operation?

On this point the recent decision of *Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School* UKEAT/0100/16 is of assistance and highlights the distinction between the infliction of a recognisable psychiatric injury and "*stress*" as a broader concept. Despite *Herry* reaffirming the principles established in *J v DLA Piper UK LLP* [2010] ICR 1052 the decision has reignited the debate as to the level of the duty of care owed to an employee when dealing with issues of stress at work.

Stress as a disability

In most circumstances involving stress at work claims long standing stress related symptoms can be indicative of an underlying recognisable psychiatric condition (for example depression) that can qualify as a disability within the meaning of the Equality Act 2010. Section 6 Equality Act 2010 provides that an individual qualifies as having a disability if they have a physical or mental impairment, and this impairment has a substantial or long-term adverse effect on their ability to carry out their normal day to day activities. Schedule 1 of the Equality Act 2010 provides at part 2 (1) (a – c) that the effect will be long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the remainder of the affected individuals life. Further, under part 2 (2), if any impairment ceases

to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is still to be treated as continuing to have that effect if it is likely to recur.

These broad parameters benefit Claimants in stress at work claims for a number of reasons. Firstly, while a Claimant's condition may be satisfactorily controlled by medication (such as anti-depressants), it does not remove it from the definition as cessation of medication may result in a recurrence of such symptoms. Secondly, psychiatric issues can lie dormant and are often not deemed to have resolved or dissipated. Thirdly if an employee has suffered from a condition but has recovered, they may still be disabled if the condition it is likely to recur.

Therefore, in a case where a Claimant who has had a period of "*mental impairment*" as a result of stress (even if relatively brief), employers should be mindful that this could be indicative of a disability (for example depression) within the meaning of the Equality Act 2010. Tactically, it is safer to assume that the impairment remains as present for the purposes of the Equality Act 2010, at least until the presentation of medical evidence upon which an employer can firmly rely on to rebut this presumption. *Herry* seems to have been taken by some as deterring this line of reasoning however.

The balancing Act

Following an employee suffering the disabling effects of stress, and disclosing this to their employer it is logical for them both to be concerned as to how the situation will affect their relationship. Once an employer is notified of an employee's disability, an employee should expect them to consider and implement reasonable adjustments. This is set out in section 20 Equality Act 2010, with the requirement being broken down into three criteria. Firstly (section 20 (3) Equality Act 2010) dictates that there needs to be a "*provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage*". Secondly (section 20 (4) Equality Act 2010), requires that "*a physical feature [must] put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage*" Finally, (section 20 (5) Equality Act 2010) requires that "*a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid*". Failure by an employer to make such adjustments will invariably be met with a claim for disability discrimination by section 21 Equality Act 2010.

It is a settled proposition that where ill health arises because of an employee's work or working environment, employers may be acting unreasonably if they do not take reasonable steps to remove the

cause. Within the stress at work context the case of *Thanet District Council v Websper* [2002] WL 31947417 provides a useful example. In *Thanet* the EAT upheld an employment tribunal's decision that, in refusing to transfer Mr Websper to an alternative role to alleviate stress caused by his work, the Council had breached an implied term that it should provide a safe place to work. This led to a finding of unfair constructive dismissal following on Mr Websper's prompt resignation.

Further in In *Royal Bank of Scotland v McAdie* [2008] I.C.R. 1087 the Court of Appeal accepted that where an employee's illness has been caused by stress at work, it may be necessary for the employer (as said by Wall LJ,) to "*go the extra mile*" (paragraph 37 of the Judgment) and seek for example to, "*find [the employee] … alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable*" (paragraph 37 of the Judgment). In cases where stress related symptoms surface in a clear and unambiguous manner, such an employee making a complaint or bursting into tears, a certain level of initiative is to be expected from an employer. In *Cosgrove v Caesar & Howie* [2001] IRLR 653, the EAT stated that "*there will no doubt be cases where the evidence ……will establish a total unavailability of reasonable and effective adjustments. But it does not seem to follow that because a former secretary, long absent from the firm and clinically depressed to the point of disability, and her general practitioner could postulate no useful adjustment, that the duty … should without more be taken to have been satisfied*".

Employers would also be well advised to consider that a reasonable adjustment might actually require the transferring of an employee to a wholly different job within the organisation (*Electronic Data Systems Ltd v Travis* 4th Mar 2004, EAT). Other adjustments could include placing the Claimant on sick leave and instituting a gradual return to work, starting with part-time work or an adjustment to working hours to enable the employee to better cope with any condition they are suffering. This does not provide Claimants with a unilateral right however as employers who do all they can to assist a Claimant who despite their attempts at prevention still suffers from a psychiatric disorder will be understandably treated favourably by Courts (*Olulana v Southwark LBC* [2014] EWHC 2707 (QB)). The question is one of fact in relation to any adjustments put in place.

The facts of Herry

With the current framework set out, it's clear that the obligations placed on an employer are very wide, and that each case is highly fact specific. *Herry* provides but one factual example of the commonly encountered workplace situation set out above. Mr Herry was employed by the Respondent as a design and technology teacher and part-time youth worker. From May 2010 Mr Herry lodged many sickness certificates; and the Employment Judge found that he had been continuously away on sick leave from June 2011. From May 2010 until April 2013 the certificates in the main referred to physical injuries, but from October 2013 onwards, they ceased to refer to any physical problem and instead gave the

description of "*stress at work*", "*work related stress*", "*stress*", or "*stress and anxiety*". Mr Herry alleged in part that his employer had discriminated against him on grounds of his disabilities, which he claimed were dyslexia, as well as stress and depression. His employer did not accept that Mr Herry had a disability during this period, a point agreed upon by Employment Judge Goodier in the Employment Tribunals Judgment of the 27th April 2015 where Mr Herry was found to not have been disabled at the relevant times.

Of note the Judgment reflected on there being a "*dearth of information*" in the medical documents as to the nature of the "*work related stress*". For example, Mr Herry took no medication for stress, he was mentally and physically fit enough to perform his role and from a medical point of view, he could return to work as soon as possible. It was recorded however that there were "*still outstanding management (non-medical) issues at the workplace which are causing stress*" and it appears these were the root cause of the issues between him and his employer.

Employment Judge Goodier found that with regards to stress, the stresses Mr Herry complained of found their origin "*largely a result of his unhappiness about what he perceives to have been unfair treatment of him, and to that extent is clearly a reaction to life events*". Effectively, factual causation was paramount but so was the necessity of establishing medical causation. He could not point to a recognisable psychiatric disorder, but rather only the wider concept of "*stress*" in support his disability claim.

Falling off the tight rope

On appeal the EAT dismissed Mr Herry's disability discrimination claims. The EAT ruled that on the facts of the case, stress caused by being unhappy with a decision or colleague was not a mental impairment and in this sense, Mr Herry was not disabled. This is a decision that should be welcomed by practitioners as it seeks to draw a line in the sand by which parties can identify when and where liability and disability could, and can crystallise.

HHJ Richardson at paragraph 56 of the Judgment concluded that "*although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities… Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise are not of themselves mental impairments: they may simply reflect a person's character or personality…. in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess*".

Effectively, a Claimant cannot simply complain of ill feelings or dissatisfaction with their employers decisions and expect the Equality Act 2010 to automatically step in.

Conclusion

Establishing disability for the purposes of the Equality Act 2010 remains a relatively low bar for Claimants. The decision in *Herry* could have been different had Mr Herry provided more detailed medical evidence, particularly as to the likelihood of the presence of a recognisable psychiatric illness and how this would have had an adverse effect on his day to day activities. Employers should always therefore take a cautious approach and treat longstanding complaints of stress as being indicative of a potential disability and worthy of proper investigation.

Herry in many respects provides a tableau of a commonly faced issue in the workplace, that of a disgruntled employee on long term sick leave who complains of stress based symptoms being caused by decisions and events they perceive as being unfair. It is not difficult to imagine where the cost of trying to accommodate such an employee could be detrimental to a business commercially, or where the capitulation on certain points may well encourage future demands from an employee. There is then the further concern that an employer may feel that as soon as it accepts that an employee has suffered from a disability caused through stress, that they are adding "*fuel to the fire*" of any future litigation in the County or High Court.

Whilst there is a distinction between an employee who suffers from a recognisable psychiatric injury caused as a result of stress and one who is simply unhappy at work, employers should take the investigation of such issues seriously as opposed to brushing them off. A potential concern posed by *Herry* is that employers may see the decision as encouraging a less proactive and sympathetic stance on their part in dealing with cases of workplace stress. Ironically, this could lead to situations where employees may well suffer serious and foreseeable psychiatric injuries due to an employer labelling the root cause of such an illness as not being their working practises, but rather that an employee is simply disgruntled and unhappy. In such a case, it is straightforward to imagine how an employee who regularly complained about such issues could far more easily establish that such injuries were not only foreseeable but that the refusal to investigate and intervene was negligent on the part of their employer.

Whilst it is a difficult tight rope to balance on, early advice and if necessary intervention can provide the essential safety net that both employees and the employers require.

LIAM RYAN

TESS BARRETT