Reading the runes?

Peter Jenkins offers an update on recent cases concerning workplace stress

Workplace counsellors are probably more conscious than most therapists of the tangible, if invisible, presence of a lawyer in the counselling room. Counselling in organisations seems to be intimately linked to the possibility of future legal action by employees who are stressed, harassed, or simply overworked. The well-known Hatton case established the principle that employers who provided access to a confidential counselling service would enjoy significant protection from burgeoning claims for 'workplace stress'. This apparently provided a strong legal endorsement of the valuable role of counselling in the workplace, paralleled by a growing evidence base of its cost-effectiveness in practice. However, some recent cases have raised concerns that simply offering employees access to counselling may not be enough to avoid the risk of successful litigation by staff. In other words, counselling does not provide a 'trump card', in the growing legal stakes over claims for stress in the workplace.

Recent cases involve an employee suing the company O2 for negligence and winning at appeal, in a case with significant reference to the role of counselling support. In the second, more recent case, a head teacher won damages of £388,000 for negligence by her local education authority, in a complex case spanning employment and education law. Both of these have been well reported in an excited flurry of internet commentary, as provided by leading employment law firms on the internet, rather than via the leading professional journals. Both cases raise important questions about the future role of workplace counselling as a 'Teflon' defence against stress claims. Is Hatton overturned by these two cases? Is it now open season for litigious employees? The answers, as always, seem to be buried somewhere in the small print, rather than in the banner headlines of the legal bulletins on the web.

Walker and Hatton cases

Workplace counsellors are well aware of the background to this issue. John Walker, a senior social worker in Northumberland, won the first breakthrough case for 'workplace stress' in 1995, but at the heavy personal cost of having to endure not one, but two 'nervous breakdowns' (in legal shorthand), in order to prove the foreseeability of harm caused by overwork. This case then led to a slowly mounting wave of similar claims for 'psychiatric injury, caused by breach of employer duty of care', generating a good deal of anxiety within the legal system. This was accompanied by frequent (and perhaps revealing) use of metaphors about the dangers of 'opening the floodgates', presumably to a tidal wave of claims that would then somehow overwhelm us all. The floodgates were, admittedly, very slightly adjusted in the Hatton case of 2002, where Lady Justice Hale carefully reviewed the guidance on workplace stress, and set out a fairly narrow template for future cases to succeed (see box, p18). Crucially, this guidance included reference to the judge's considered view that an employer providing a confidential counselling service 'would be unlikely to be found in breach of his duty of care towards his employees' (Hatton v Sutherland [2002]).

However, the terrain became slightly more complicated with the later Intel case (reported in *Counselling at Work*[1]). Here, the claimant was a member of staff who had been stressed by overwork, leading to depression and a failed suicide attempt. In this situation, she had received counselling, both from Intel's counselling service, and from community psychiatric services. However, the judge concluded that the provision of an in-house counselling service was not sufficient, on its own, to cancel out the claimant's case for damages. Management still had an over-riding responsibility to react in a positive way to signs of distress and complaints of overwork from staff. In other words, the suggestion in the *Counselling at Work* report was that 'good' counselling does not compensate for 'bad' management in the litigation lottery'[1].

Counselling as legal protection

The O2 case (see box, right) raises some key issues about the role of counselling as a legal protection against employee claims for psychiatric injury in the workplace. However, the case broadly confirms the logic of the earlier Hatton checklist. In the O2 case, the claimant was vulnerable, partly by virtue of previous depression and anxiety, but also because of her ongoing irritable bowel syndrome (IBS), itself possibly as much a symptom of her stress at work, as a further contributing stress factor. The company was made aware that she was receiving counselling,

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IMAGEZOO/GETTY

The O2 case

Susan Dickins had worked for the O2 company since 1991, originally as a secretary, being promoted over time to more senior positions as a management accountant. The work involved tiring travel, long hours and the pressure of preparing for complex audits, without sufficient training or support, leading to two days off work in 2000. The following year, she began to suffer from irritable bowel syndrome, and began counselling for this, arranged via her GP. Work continued to be very stressful, with further difficult audits and another move to a different department. By early 2002, Ms Dickins was feeling exhausted and was late for work almost every day, finding it increasingly difficult to get up in the morning.

At a crucial series of meetings in spring 2002, she complained to her line manager of being 'stressed out' and asked for six months off as a 'sabbatical'. He informed her about the company's counselling service but she did not act on this, as she was already receiving counselling from her GP practice. At her annual appraisal, she informed a second line manager about her counselling, and an offer was made to refer her to the occupational health department, although this did not actually materialise. Several days after her appraisal, Ms Dickins was unable to go to work, as she became sweaty and trembling at the attempt. On the advice of her counsellor, she consulted her GP, who signed her off work with anxiety and depression. She did not return to work and her employment was terminated later that year. She then brought a legal action for damages against the company, on the grounds of negligence, and was awarded £110,000, a judgment upheld at appeal.

Dickins v O2 plc [2008]

The Connor case

Erica Connor was a head teacher of a primary school, with a mainly Muslim catchment area, having been promoted from deputy. The school appeared to be successful and flourishing until 2003, when the membership of the school governing body changed to include two new members. These two governors then agitated for radical changes, to reflect the predominantly Muslim school pupil and parent base. This led to a significant degree of conflict between these two governors and the head teacher, who felt under a growing level of stress. She was accused of 'Islamophobia' and became the subject of a petition against her, circulated in the local community. In 2005, Ms Connor was signed off work by her GP with stress and depression, and was subsequently diagnosed by a psychiatrist as experiencing severe depression, with symptoms of post traumatic stress disorder.

She brought a complex case against the employing local education authority (LEA), alleging breach of duty of trust and confidence as employer, breach of statutory duty, breach of the Protection from Harassment Act 1997 and negligence. The case for negligence alone was proven, and she was awarded £388,000 damages.

Connor v Surrey County Council [2009]

but did not know the reason for this. Crucially, the judge commented that, in terms of character, Ms Dickins had previously been 'a conscientious, hardworking and reliable employee'. Her problems had clearly been evident for some time to her employers, rather than coming completely 'out of the blue'.

The employer's breach of their duty of care lay in their failure to manage this developing situation in a proactive manner. In the judge's view, Ms Dickins should have been sent home after the appraisal, to prevent the imminent collapse of her health. Her request for a 'sabbatical' should have been read as a significant call for support. The suggestion that she seek in-house counselling was, on its own, an inadequate response to her level of distress. She required urgent and effective referral to occupational health for expert assessment. According to this judgment, employer duty of care for staff members' mental health therefore requires an active, interventionist managing of such situations, rather than a passive and reactive stance. Simply giving staff information about the company's counselling service is woefully inadequate, in this context.

'First absence case'

The case of Connor v Surrey County Council (see box, above) has caused quite a stir in legal circles, as it is being labelled as a 'first absence case'. Unlike previous cases, such as Walker and O2, the claimant had not previously had an absence for sickness, and then returned to work. The issue was therefore how she had communicated her level of distress to the LEA, and how the LEA had responded. The judge found Ms Connor to be an impressive witness, who had communicated her concerns clearly to the LEA, both

in person and via email. The LEA had sought to balance the concerns of the two governors against the pressure being experienced by the head. It had first tried to introduce mediation and an independent enquiry, rather than responding promptly and effectively to the developing risk to her mental health. As with the O2 case, there was a failure of proactive management. It was pointed out that the LEA had ample powers to resolve the emerging conflict between the head and the two governors, via recourse to sections 14-19 of the School Standards and Framework Act 1988, by appointing additional governors.

The Connor case has attracted a good deal of professional and media attention, not least for the aspects relating to alleged 'Islamophobia'. The National Union of Teachers has welcomed the court's decision, describing it as 'a milestone in giving legal protection to teachers against stress which the judge recognised to be all too common in the profession'. This actually touches on a key element of the case, in whether the judge really was saying, in effect, that teaching was more prone to stress than other professions, in contrast with the earlier Hatton view that no occupation is inherently stressful. This aspect needs careful review, as it may be that the judge was doing no more than simply acknowledging the prominent research and case law on teaching and stress, rather than marking it as an additional vulnerability weighting for future litigants from this occupational group.

Counselling or proactive management?

Legal comment has focused, in particular, on the role of counselling as an employer's defence against cases like this. Comment has been made to the effect that it may not be sufficient for employers to provide either an employee assistance programme, or a confidential helpline, in order to avoid future cases of this kind. (Incidentally, neither of these was mentioned in Hatton, which referred variously to generic, unspecified, confidential counselling services, ie 'confidential help to employees'; 'a confidential advice service with referral to appropriate counselling or treatment services'; and 'arranging treatment or counselling'.)

As with Intel and O2, the Connor case reflects primarily a failure of proactive management, leading to a breach of duty of care, rather than anything more specific about the nature or quality of the counselling service being provided. It does, however, raise a whole series of questions about the future development of legal claims for workplace stress. It does seem that, despite appearances, the Hatton checklist still stands. Employers need to take full account of employee vulnerability factors as communicated to them and to act quickly and decisively, in order to provide appropriate occupational support, training and supervision. Managers need to use their powers to intervene and resolve situations affecting the mental health of staff.

Checklist for employer liability

- Is the individual subject to undue pressure of work that is:
  – unreasonable by any standard?
  – unreasonable judged in comparison with the workload of others in a similar job, or due to individual vulnerability known to the employer?
- Has the individual received an injury to health, either physical or psychological, which is directly attributable to stress at work?
- Was this injury reasonably foreseeable by the employer?
- Is this injury directly and mainly attributable to the employer's breach of duty of care, in failing to reduce workplace stress (by providing confidential counselling, redistribution of duties, training, etc)?

Adapted from Hatton v Sutherland [2002]

Vulnerability and previous mental health history

While employees clearly need to communicate their vulnerability to workplace stress to their managers, this may actually disadvantage them in the recruitment or promotion stakes. This seems to be the message from yet another recent case, where Christine Laird, former chief executive of Cheltenham Borough Council, was taken to court by her former employers, for allegedly not disclosing full details of her history of depression and anxiety, prior to her appointment. In answering questions in the pre-employment health questionnaire, she had responded positively to the question: 'Do you normally enjoy good health?' and negatively to the related question 'Do you have a mental impairment?' In fact, she had experienced three episodes of depression and anxiety between 1997 and 2001, but had seen these as being primarily stress related.

While working for the borough, Laird had experienced a difficult working relationship with its new leader of the cabinet, suffering deteriorating mental health, followed by three months in a psychiatric hospital. While the court dismissed the borough's claims for costs incurred by her appointment and subsequent ill-health, Laird was still left personally liable for legal costs of £190,000. According to mental health campaigners, the court judgment places employees with mental health problems in a difficult position. 'Charities fear the case could make it more difficult for people who have suffered depressive illness to get a job, because Cheltenham and many other organisations have looked again at their procedures and tightened up disclosure forms

in the light of the case.'[2] Employees with mental health histories now face the dilemma of, on the one hand, needing to disclose their history to communicate their potential vulnerability to stress in the workplace, and on the other, facing the risk of discrimination in the process of recruitment or promotion. This difficult choice may arise, even despite the protection available (in theory at least) from the Disability Discrimination Act 2005.

Damages for workplace stress

Overall, the O2 and Connor cases remain firmly within the mould, set by Walker and later confirmed by Hatton, namely the common law duty of management to avoid harm to staff via breach of duty of care. The O2 case has significantly changed the terms of debate in another direction, however. In the Hatton case, the damages payable for workplace stress were reduced by the impact of other non-work factors, such as marital conflict, bereavement or illness. This has now been challenged in the rationale provided by the judge in the O2 case. Here, it is argued that, where there is a 'cumulative cause' to the damage, namely a whole series of stressful life events, it is not fair or sensible to try and reduce the damages accordingly, as the psychiatric injury is seen to be 'indivisible'. Legal jargon apart, this will have significant consequences for successful claimants, as they are now less likely to have their compensation awards reduced for concurrent stress in their family life. Awards will probably increase and so, logically, will the costs to employers and insurers in defending these kinds of cases. Whether more cases will be successful is clearly still a moot point.

Counselling: a Teflon shield?

Finally, what about the role of counselling as the 'Teflon shield' against claims for workplace stress? From these cases, it very much seems that counselling now occupies something of a Rogerian position in the world of stress litigation. That is, providing a confidential counselling service is 'a necessary, but not sufficient condition', to protect an employer against successful claims. There is also a slightly worrying thought that the counselling profession may have somewhat over-estimated the role of counselling in the workplace in this respect, perhaps assuming that the courts were now recognising counselling as an effective prevention or treatment for stress. This would now seem to be an over-optimistic reading of the court reports. In the Hatton case, the judge stressed the role of confidentiality, over and above that of therapy: 'The key is to offer help on a completely confidential basis' (Hatton v Sutherland [2002]). In the Intel and O2 cases, it seems clear that the judge saw counselling primarily as a referral route for medical, occupational health or psychiatric treatment, rather than as an effective treatment in its own right. Hence the stress was placed on the *confidential* nature of the service, rather than on it being a therapeutic service as such.

> *'...the advantage of such a service was because many employees were unwilling to admit to their line managers that they were not coping with their work for fear of damaging their reputations. A confidential service would enable the employee to take advice without making any potentially damaging disclosure direct to the employer.'*
> (Dickins v O2 plc [2008])

A workplace confidential counselling service is necessary, by this logic, *not* because it directly addresses the employee's distress, but primarily because it acts as a *referral route* to other forms of help. Similarly, where an employee is known to be having counselling provided outside the workplace, this is less about them receiving effective support and help from a competent practitioner, than about its perceived value as a powerful indicator to managers that the staff member is undergoing a significant level of stress.

Conclusion

Recent successful cases of suing for workplace stress follow the tramlines laid by Walker and confirmed by Hatton. Cases for psychiatric injury at work will only succeed where the claimant can establish breach of employer duty of care. This is much less about providing a notional counselling service, whether in the form of a helpline, EAP or in-house service, than about a positive, proactive management responsibility to monitor staff stress levels, respond to information about potentially vulnerable employees and act decisively where possible, to reduce work stressors with appropriate measures. The precise status of counselling within this matrix remains elusive, unclear and unconfirmed, perhaps valued more by the courts for its role as a confidential conduit to other forms of support, rather than as an effective treatment, therapy or intervention in its own right. ■

References

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