Stress claims and employment litigation

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Claims involving an employment-related stress injury give rise to numerous practical challenges and legal issues. Here, we focus upon a number of matters that need to be considered at an early stage in any contemplated litigation, including the scope for reliance upon the unheralded Employers' Liability (Compulsory Insurance) Act 1969.

Advising in the dark

Emotions run high when relationships at work have broken down in circumstances where an employee believes they have been treated unfairly.

Urgent legal advice will often be sought when deciding whether to accept a time-limited offer. In many instances, it will be apparent to the adviser, based on what they observe or have communicated to them, that an employee is experiencing psychological difficulties that can colour their judgement. However, the general lack of access to GP services means that it is unlikely that a formal medical diagnosis regarding the employee's psychiatric condition will have been undertaken. This can leave the adviser in an invidious position when called upon to consider the overall merits of the situation.

Importance of obtaining an independent expert opinion

It is important to consider carefully whether a formal independent medical diagnosis from a psychiatrist should be sought in cases where there is, or appears to be, a significant work related mental health condition and a key decision impacting upon the employee's future needs to be taken. This is particularly important if a personal injury claim is being contemplated in the High Court as, in order for damages in negligence to be recoverable, a mental health condition that amounts to a psychiatric injury must be present; see *Hatton & Barber*.

Fluctuating nature of psychiatric conditions

Diagnosing mental health conditions is rarely an exact science and stress cases often lack the certainty of a key index event. A major depressive disorder does not abruptly 'switch on' (or 'switch off'). One cannot be normal one day and clinically depressed the next, nor can one be clinically depressed one day and completely better the next. Psychiatric conditions develop and progress over time.

The extent to which the employer may continue to exercise a sphere of influence, based on its conduct, over the development of an employee or former employee's mental state is often not sufficiently well appreciated. For instance, an adjustment disorder can develop over time and become a moderate diagnosable depressive disorder, which can then develop into a major diagnosable depressive disorder, all of which are diagnosable psychiatric illnesses. An allegation that the employer has negligently caused the exacerbation of a mental health condition is frequently a key issue in High Court cases. Even after the employment relationship has broken down, the employer may wish to consider whether to offer some form of financial contribution (without the admission of liability) directed towards enabling the employee (or ex-employee) to obtain some privately funded talking therapy or psychiatric input. This can help prevent the condition becoming worse and the likely size of any damages award increasing.

Presumption that a litigant will have mental capacity

Under para 3.4 of the SRA's Code of Conduct for Solicitors, a solicitor must consider and take account 'of their client's attributes, needs and circumstances'. As such, legal advisers have a professional duty to satisfy themselves of their client's capacity to give instructions.

'one of the key issues for employers is whether to apply a single whistleblowing framework and policy to their UK and EU workforces'

There is a general statutory presumption that a litigant will have mental capacity – ie the ability to make a decision for themselves – unless it is established that they don't. Rarely will the impact of a work-related mental illness be so disabling that an employee is unable to make a decision and can be said to lack capacity – but it can happen. It is important for an adviser to consider the statutory test for capacity set out at s.2(1) of the Mental Capacity Act 2005, supplemented by the accompanying code of practice and, if appropriate, refer the client to a psychiatrist for a professional opinion.

SRA Principle 7: 'You act in the best interests of each client'

While a prospective claimant may be in something of an emotional state given the treatment in their workplace, ultimately, it may not be in their best interest to reject offers and litigate. This is especially the case where the onset of the mental health issues is recent and they are able to quickly recover their poise. The reality of litigating a heavyweight claim in this area is that the employee is, in one sense, left frozen in time, having to relive traumatic events which, in the short term, will not improve their mental health.

Thus, taking a vulnerable person through a long and complex litigation journey is an unwise thing to consider doing, unless the adviser has formed the view that the individual:

- is not actually able to move forward with their life unless they attempt to hold their employer to account;
- is robust enough to withstand the litigation and has a good support network around them and will therefore stay the course;
- is facing the prospect of career losses giving rise to a significant financial claim and/or the likelihood of stigma damage; and
- has viable claims that offer a reasonable prospect of success.

Is cover available under the Employers' Liability (Compulsory Insurance) Act 1969?

ELCIA imposes a statutory duty upon most employers (with the exception of the NHS and other prescribed organisations) carrying on business in Great Britain to carry liability insurance through an insurer regulated by the Financial Conduct Authority to cover the risk of their employees (which means an individual who has entered into or works under a contract of service) suffering *bodily injury and/or disease* during the course of their employment through work. These policies offer valuable protection to employees (and employers) and pay out even in the event of an employer's insolvency. In the High Court, this cover shifts the entire dynamic of the litigation, as the insurer, in effect, takes over conduct of the defence and the policy provides for payment of compensation for 'injury or disease, whether agreed or negotiated or awarded by *a court*' and for the payment of the employer's costs and expense of the litigation as well as those of the claimant, 'for which the insured is legally liable'.

It is common for policies issued in compliance with the ELCIA, to define 'bodily injury' as including *mental injury*. These policies do certainly cover psychiatric injury claims in the High Court. However, there appears to be no reason, in principle, why cover under the ELCIA is not also available to a claimant and the employer, in the tribunal setting, where there is an allegation that the discrimination has caused a mental injury. This view is given credence by the recent Court of Appeal decision in *Irwell Insurance Co* in which it was held that the tribunal can hear claims against insurers of insolvent former employers and that the tribunal is a 'court' for the purposes of the Third Parties (Rights against Insurers) Act 2010. This is a key finding given that the ELCIA refers to compensation 'awarded by a court'.

The availability of cover under the ELCIA in the tribunal may make it more likely that the tribunal will exercise its discretion to award costs in favour of the claimant in these claims, where the conduct of the respondent has been unreasonable or vexatious.

Accordingly, it will be prudent for a claimant to direct their employer (or former employer) to report the discrimination claim to its ELCIA insurer if there is a potential personal injury claim involved. Likewise, an employer should be advised to notify its insurer as soon as a discrimination claim is threatened or commenced. This may enable the employer to obtain cover in respect of its costs and any compensation award made by the tribunal against it.

'the Directive could drive a positive new culture of openness and speaking up'

Medical records: friend or foe?

An important first step for any adviser (claimant or respondent) is to obtain medical records under the Access to Medical Reports Act 1988. The evidential value that contemporaneous medical records such as GP and hospital records play cannot be overstated. It is surprising how often employees download information to their doctor or therapist, often in an unguarded fashion, which may contradict a factual issue that arises in their case.

While 'meat and drink' to personal injury lawyers, the process of forensically wading through medical records is alien to many employment lawyers, but it is a necessary first step.

Pre-employment health questionnaires

Senior employees commonly complete a medical health questionnaire before taking up employment. Evidence of consistency and honesty in the answers provided is important; however, it is not uncommon for employees to be less than frank when completing these questionnaires, notwithstanding the protection afforded under the EqA. A failure to provide full disclosure of a pre-existing mental health condition is clearly something that will impact upon an employee's credibility and ultimately, their prospect of success in the litigation.

Impact of disclosures made to occupational health

A primary requirement in negligence claims based on stress is that the claimant must prove a breach of duty of care that gives rise to a foreseeable risk of injury. Whether information of a developing mental health condition has been adequately conveyed to the employer is invariably a hotly contested matter in a High Court case.

The Court of Appeal's decision in *Yapp* provides a good summation of the current state of the law on foreseeability.

It is important to bear in mind that an employee's disclosure to an occupational health provider does not fix the employer with knowledge of the health condition, unless the information has actually been provided to the employer; see *Hartman*.

Choice of forum: High Court v employment tribunal

There are a host of factors that need to be considered before determining this important question.

In the tribunal, the ability to seek compensation for personal injury is parasitic on a finding of discrimination under the EqA or whistleblowing detriment.

In *Sheriff*, the Court of Appeal confirmed that the language of the discrimination statutes makes it clear that a claimant is entitled to be compensated for the loss and damage actually sustained as a result of the statutory tort.

This includes compensation for personal injury. If there is no such finding then no personal injury claim can be pursued. Generally, financial compensation awarded in assessing the loss flowing from the discrimination will cover the same ground as compensation for personal injury. The tribunal can make a separate significant award for injury to feeling and general damages for personal injury, albeit they need to be alert to the risk that what is essentially the same suffering may be being compensated for twice under different heads, see *HM Prison Service*.

An example of a high-value award made by the tribunal can be found in *Michalak*, where compensation was awarded for unlawful sex and race discrimination, in a sum approaching £4.5m. This included £56,000 for psychiatric injury in view of its 'enduring' effect on the claimant's personality, in addition to a maximum pay out (as it was then) of £30,000, for injury to feelings, reflecting the lengthy nature of the campaign waged against the claimant in that case.

Does the claim fall within the 'Johnson exclusion zone'?

An important issue for an adviser to consider is whether the injury may be said to arise out of the dismissal itself. Claims in tort and contract cannot be brought for psychiatric injury arising out of the fact or manner of dismissal, as confirmed in the landmark policy-driven decision of the House of Lords in *Johnson*.

Therefore, if the situation falls within the *Johnson* exclusion zone, a personal injury claim cannot be pursued in the High Court, but the tribunal may still offer a viable forum within which to proceed, assuming unlawful discrimination can be proved. However, even where a dismissal has occurred, exceptionally, financial losses may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. As set out by the House of Lords in *Eastwood*, financial loss flowing from suspension is one instance of this. Another is where an employee suffers

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financial loss from psychiatric or other illness caused by pre-dismissal unfair treatment.

Is there a foreseeable risk of psychiatric injury occurring?

In the High Court, the claimant must prove a breach of the duty of care (either contractually or in negligence) that has given rise to a *foreseeable risk of injury*. This is often the greatest hurdle to overcome. Whereas in a direct discrimination claim before the tribunal, the claimant does not need to demonstrate that there was a foreseeable risk of injury, only that there was a direct causal link for any loss arising naturally and directly from the discrimination and the psychiatric injury, as held by the Court of Appeal in *Essa*.

However in multiple cause cases, even in the tribunal, it is still necessary to demonstrate that it was the particular discriminatory conduct that actually caused or materially contributed to the injury. So an employee's medical history and the range of potential diagnosable psychiatric illnesses and causes will still need to be unravelled and investigated; see *BAE Systems*.

Likelihood of cost recovery and the impact of qualified one-way costs shifting

A significant point of difference is that in the civil courts 'costs follow the event', where, as in the tribunal, the likelihood of recovering cost is remote, even if the case succeeds.

In the civil courts, if a claimant succeeds in a personal injury claim, they recover and enforce costs orders obtained in the usual way. Whereas, the qualified one-way costs shifting (QOCS) regime means that if the claimant loses, costs orders cannot usually be enforced against them, except up to the extent of any damages and interest awarded (usually zero in this instance) unless the claimant refused to accept a Part 36 offer and recovers less at trial, or where their case is struck out in certain instances.

Where a client does have a choice of forum in which to proceed with their personal injury claim, an adviser who fails to discuss with the client the issue of cost recovery, as part of the decision making process may not be acting in compliance with the SRA Principle 7, ie to act in the best interests of their client.

Conclusion

This remains a highly complex area of the law and employment lawyers would be well advised to dust off their 'white book', as well as to consider the impact of the ELCIA in the context of a personal injury claim in the tribunal.

KEY:

ELCIA	Employers' Liability (Compulsory Insurance) Act 1969
Hatton & Barber	*Hatton v Sutherland; Barber v Somerset CC* [2002] 2 All ER 1
EqA	Equality Act 2010
Yapp	*Yapp v Foreign and Commowealth Office* [2014] EWCA Civ 1512
Hartman	*Hartman v South Essex Mental Health Community Care NHS Trust* [2005] IRLR 293
Sheriff	*Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481
HM Prison Service	*HM Prison Service v Salmon* [2001] IRLR 425
Michalak	*Michalak v Mid-Yorkshire Hospitals NHS Trust* ET/1810815/08
Johnson	*Johnson v Unisys* [2001] ICR 480
Eastwood	*Eastwood v Magnox Plc and McCabe v Cornwall CC* [2004] 3 All ER 991
Essa	*Essa v Laing* [2004] IRLR 313
BAE Systems	*BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 118
Irwell Insurance Co	*Irwell Insurance Co Ltd v Watson* [2021] EWCA Civ 67