

# WORKPLACE STRESS RESEARCH: LITIGATION RELATING TO WORKPLACE STRESS

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## Abstract

*This research will identify the most prominent categories of workplace stress resulting in legal action, lessons for litigants in terms of the success or failure of legal action, consequences for the respective parties of the outcomes of legal proceedings, and information about the organizational contexts giving rise to workplace stress litigation. This article examines case law relating to workplace stress, and information on the flow of interpretive case law will no doubt continue to capture the attention of human resource professionals who need to be aware of potential legal liability in this domain. In this respect, this work will make an important contribution to the existing literature.*

## Key words

Workplace stress, litigation, business law, human resource management employment relations

Workplace stress has been widely recognized and discussed in a variety of literature studies over many years. Since Karasek's landmark paper appeared in 1979, stress in the work environment has received considerable attention in a wide variety of academic literature studies as being a significant issue for employers, workers, and wider society (Karasek, 1979; Siegrist, 1985; Johnson & Hall, 1988; McCaig & Harrington, 1998). There is evidence from both cross-sectional (Broadbent, 1985; Estry-Behar et al., 1990; Bromet, Dew, Parkinson, Cohen, & Schwartz, 1992) and longitudinal studies (Kawakami, Haratani, & Araki, 1992) that high levels of psychological demands, including a fast work pace and high levels of conflicting demands, are predictive of common mental disorders, largely mild to moderate depressive and anxiety disorders (Stansfield & Candy, 2006). The latest estimates from the Labour Force Survey show ([www.hse.gov.uk/statistics/causdis/stress/](http://www.hse.gov.uk/statistics/causdis/stress/)):

1. The total number of cases of work-related stress, depression or anxiety in 2013/14 was 487 000 cases (39%) out of a total of 1 241 000 cases for all work-related illnesses.
2. The number of new cases of work-related stress, depression or anxiety in 2013/14 was 244 000.
3. The rates of work-related stress, depression or anxiety, for both total and new cases, have remained broadly flat for more than a decade.
4. The total number of working days lost due to work-related stress, depression or anxiety was 11.3 million in 2013/14, an average of 23 days per case of stress, depression or anxiety.
5. The industries that reported the highest prevalence rates of work-related stress, depression or anxiety (three-year average) were human health and social work, education and public administration and defence.
6. The occupations that reported the highest prevalence rates of work-related stress, depression or anxiety (three-year average) were health professionals (in particular nurses), teaching and educational professionals, and health and social care associate professionals (in particular welfare and housing associate professionals).

Researchers have reported on the negative consequences associated with workplace stress, both for individuals and organizations (Cooper and Marshall, 1976). Historically, the typical response from employers to stress at work has been to blame the victims of stress rather than its cause (Mitchie, 2002, p. 68). It has been recognized that employers have a duty, in many cases enforceable by law, to ensure that employees do not become ill (Mitchie, 2002, p. 68). The aim of this article is to analyze the legal record on litigation since 2002, discussing how the findings inform the wider literature.

## Literature Review

Karasek (1979) described two key dimensions of the psychosocial work environment: psychological demands and decision latitude, the latter being composed of decision authority (control over work) and skill discretion (variety of work and opportunity for use of skills). According to Karasek's "job-strain model," jobs can be classified into four types. The first type is "high-strain jobs," for which fatigue, anxiety, depression, and physical illness can be predicted when the psychological demands of a job are high, the workers' decision latitude is low, and the worker lacks the resources to deal with demands (Karasek, 1979; Stansfield and Candy 2006). The second type, "active jobs," are often very demanding; however, workers here have sufficient control over their activities and the freedom to use available skills, and this type of job is associated with only average psychological strain and active leisure time. The third type, "low-strain jobs", which make few psychological demands and offer high levels of control, are predicted to cause lower than average levels of psychological strain and less health risks, because they present relatively few challenges, and decision latitude allows the worker to respond optimally to these few challenges. The fourth type of job, the "passive job," is characterized by low demands and low control, but only average levels of psychological strain and health risk are expected.

Stress has been defined in a variety of different ways; however, the generally accepted definition is one involving interaction between a situation and the individual. Stress is the psychological and physical state that results when the resources of the individual are not sufficient to cope with the demands and pressures of the situation (Mitchie, 2002). Stress can manifest itself in different forms, particularly in changes in behavior. Acute responses to stress may be emotional; for example, they include anxiety, depression, irritability, social isolation, and fatigue (Michie, 2002). There is evidence that workplace stress can cause a wide range of psychological and work-related harm, including diminished work performance, lower job satisfaction, absenteeism, career interruptions, job loss, depression, and health problems. Stress can therefore have a detrimental impact on the performance of organizations and individuals.

Workplace stress is defined by the Health and Safety Executive as "a harmful reaction people have to undue pressure and demands placed on them at work. The number of cases reported in 2011/2012 was 428,000 representing 40% of work related illnesses"-(HSE 2013, page 2). Mitchie (2002), in research into psychological ill health and associated absenteeism in the workplace, identified five associated key factors: (a) long hours worked, work overload, and pressure; (b) interactions between work and home stress; (c) lack of control over work and lack of participation in decision making; (d) poor social support; and (e) unclear management and work roles and poor management style.

Research has revealed that one in six women and one in nine men are likely to require treatment for a psychiatric illness during their lifetime (Parliamentary Office of Science and Technology, 2007). A survey of occupational and mental health in a national UK survey carried out by Stansfeld et al. (2011) found that women had a higher prevalence of common disorders than men across all major standard occupational classification groups. For example, women in professional occupations had almost twice the prevalence of common mental disorders as men in professional occupations (Stansfeld et al., 2011). CMD refers to depressive and anxiety disorders, including depression, generalized anxiety disorder, mixed anxiety and depression, panic disorder, OCD, post-traumatic stress disorder (PTSD), phobias, and social anxiety disorders (NICE 2011).

However, while the literature referred to above provides a comprehensive discussion of the forms workplace stress might take and the organizational dynamics that give rise to such stress, there has been a dearth of literature discussing the legal claims made relating to workplace stress in the organizational context.

This research will identify the most prominent categories of workplace stress resulting in legal action, lessons for litigants in terms of the success or failure of legal action, consequences for the respective parties of the outcomes of legal proceedings, and information about the organizational contexts giving rise to workplace stress litigation. This article examines case law relating to workplace stress, and information on the flow of interpretive case law will no doubt continue to capture the attention of human resource professionals who need to be aware of potential legal liability in this domain. In this respect, this work will make an important contribution to the existing literature.

## Legal Context

Traditionally, English law embodied a strong reluctance to hold employers liable in terms of negligence for workplace stress. Ostensibly, this reluctance was founded on difficulties in identifying psychological harm and concerns about creating too wide an ambit of liability. The latter issue has become a popular media focus as claims are made that we live in an increasingly “blame and sue society.” Reputedly, organizations become less innovative, scarce resources are unproductively diverted, and unnecessary and costly precautions are taken (Williams 2006). The fact there may be no objective proof for the idea that we live in an increasingly “blame and sue” society is beside the point when a popular belief to the contrary has taken hold. Thus, many employers increasingly *believe* themselves to be at heightened risk of being unfairly sued, despite the *actual* likelihood of being the target of litigation for workplace stress, (Williams, 2006). Identifying the potential for psychological injury and potential legal responsibility for such harm can be far from an easy task. However, a series of cases since 1995 has provided guidance in this area as to when liability might arise.

First, in *Walker v. Northumbland County Council* (1995) ICR 702 damages were awarded for psychiatric injury caused by the employer’s negligence. The court held that the employer was aware of Walker’s vulnerability and had failed to provide help; thus Walker’s second breakdown was reasonably foreseeable. Colman stated: “Where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of stress, the employer was under a duty of care to provide a safe system of work, not to cause the employee psychiatric harm by reason of the volume or character or the work the employee was required to perform.” The law in this area was also considered by the Court of Appeal in *Hatton v. Sutherland* (2002) 2 All ER 1. Hale LJ set out the law in this area when issuing the judgment of the court.

## Duty

It was emphasized that there are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para. 22). The ordinary principles of employer liability apply (para. 20). The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para. 23), and did this kind of harm have 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) (para. 25). In relation to foreseeability, the court stated that it depends upon what the employer knows (or ought reasonably to know) about the individual employee. Mental disorders, by nature, are harder to foresee than physical injury but may be easier to foresee in a known individual than in the population at large (para. 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of a job unless he or she knows of some particular problem or vulnerability (para. 29). The test is the same whatever the employment: there are no occupations that should be regarded as intrinsically dangerous to mental health (para. 24). Factors likely to be relevant in answering the threshold question include: (a) the nature and extent of the work done by the employee (para 26). 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 (para. 27). Does he or she have a particular problem or vulnerability? Has he or she already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged uncharacteristic absences? Is there reason to think that these are attributable to stress at work, for example, because of complaints or warnings from him or others?

## Breach

In relation to the question of breach of duty, the Court developed several propositions to help determine the issue of breach (Barret, 2002). First, the employer is only in breach of duty if he or she has failed to take steps reasonable to the circumstances, bearing in mind the magnitude of the risk, the gravity of the harm which may occur, the costs and practicability of preventing harm, and the justification for running the risk (para. 32). Second, the size and scope of the employer’s operation, its resources, and the demands it faces are relevant in deciding what is reasonable. These include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para. 33). Third, an employer can only reasonably be expected to take steps that are likely to do some good, and the court is likely to need expert evidence on this (para. 34). Fourth, an employer who offers a confidential advice service with referral to appropriate counseling or treatment services is unlikely to be found in breach of duty (paras. 17 and 33).

Fifth, if the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue the job (para. 34). Sixth, in all cases it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his or her duty of care (para. 33).

### **Causation**

The claimant must show 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 (para. 35). Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered that is attributable to his wrongdoing, unless the harm is truly indivisible. It is up to the defendant to raise the question of apportionment (paras. 36 and 39). The assessment of damages will take into account any preexisting disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event (para. 42). Thus, using the language of Simon Brown LJ in *Garrett v. Camden London Borough Council* (2011) EWCA Civ 395, there must be a risk of illness that the claimant's employers ought to have foreseen and properly ought to have averted; otherwise, the claim must fail.

While in cases where claims were initially upheld, the courts might have operated on the assumption that few claims would result from their decisions, employers' organizations have complained that the courts had created a potentially "very onerous duty indeed" with a large scope of potential legal liability, given the growing awareness of workplace stress. Critics observed that the courts might be seen as encouraging a compensation culture and placing excessive burdens on employing organizations. This paper assesses the scope of liability for workplace stress through an analysis of all claims made alleging workplace stress since 2002, evaluating whether these sorts of fears have proved to be justified.

### **Methodology**

The term *claimant* is used to refer to the worker who made the original complaint of workplace stress, and the term *defendant* refers to the employing organization defending the claim. In an attempt to establish the number and type of claims brought, the population of individual case records relating to workplace stress was accessed electronically from a variety of legal databases. It is apparent, despite the decisions of the Court of Appeal in *Hatton v. Sutherland* (2002) 2 ALL ER 1, the House of Lords in *Barber v. Somerset County Council* (2004) 1 WLR 1089, and the guidance laid down in those cases that judges are still finding difficulty in applying appropriate principles in claims arising from stress at work. This analysis of cases between 2002-2014 will shed valuable light on the nature of workplace stress claims litigated in the courts and the likely chance of success in such cases.

### **Case Analysis**

The findings on workplace stress litigation are presented in six main sections: (a) types of workplace stress claims; (b) categories of persons and occupations who bring cases to the court; (c) alleged factors causing harm; (d) outcome of claims; and (e) employment relations issues. Some preliminary words of caution should be entered about the findings. What we are able to examine are those cases litigated, and many other claims will be withdrawn or settled out of court. What we are concerned with here are the findings from the legal record.

#### **(i) Types of Workplace Stress Claims**

With regard to the nature of work-place stress claims, the majority of claims are related to clinical depression (35%), followed by mental breakdown (24%), anxiety/stress disorders (21%), and psychological distress (20%). Whilst these are the terms used there is likely to be significant overlap between those using diagnostic terms (depression, anxiety) and other terms- breakdown, distress- from a clinical perspective many of those with distress/breakdown will have anxiety and/or depression. In most cases, the consequence of suffering the workplace stress was that the claimant never returned to work. The fact that the most common types of workplace stress suffered by claimants are related to stress, anxiety, or depression is consistent with the occupational and mental health survey undertaken by Stansfeld et al. (2011), which reported that mixed anxiety/depressive disorder had the greatest prevalence. This finding of depression from workplace stress is also reflected in the U.S. population (Substance Abuse and Mental Health Services Administration, 2007), among which 7% of full-time workers aged 18 to 64 have experienced a major depressive episode in the past year (Ganster & Rosen, 2013). Depression is also a leading cause of disability (World Health Organization) and sickness (Bultman et al., 2006; Ganster & Rosen, 2013).

## (ii) Categories of Persons and Occupations Who Bring Cases to the Court

Sixty-five percent of claimants in workplace stress litigation since the landmark case of *Hatton v. Sutherland* (2002) 2 ALLER 1 were male, whereas 35% were female. Women and men employed in manual jobs in which low pay, long hours, and the pace of work were cited as significant issues constituted a prominent feature of litigated cases. This reflects findings that manual work can often be associated with lack of control over jobs, high noise levels, and poor work relations, all of which contribute to anxiety and depression (Tennant, 2001). The majority of claims made by men were related to clinical depression or psychological distress—alleged to have been caused by either excessive workload or bullying. Meanwhile, the particular demands placed on women workers are often referenced in cases because women often have a double burden, juggling paid employment with child care and domestic responsibilities. They are also more likely to be working unsocial hours and caring for the elderly and disabled. Balancing these conflicting demands presents significant risks to mental health. Women, therefore, are often likely to experience both the role conflict and role overload that manifests itself in terms of severe anxiety and stress disorders.

Claimants' occupations ranged across a wide spectrum, with the largest proportion of claimants working in the professional category, followed by manual workers. It is perhaps the teaching profession for which cases of work-related stress have attracted most media focus; however, the teaching profession was not over represented in terms of litigated cases. The same was true for the National Health Service (NHS), which also seemed surprising because a variety of research has reported that stress and the effects of stress are particularly prevalent among health-care professionals (*Edwards v. Burnard*, 2003; Loretto et al., 2010; Health and Safety Executive, 2013). A plausible explanation might be that, in teaching and health, the incidents and claims are settled out of court with the help of trade unions or professional representation. However, Hale's observation in *Sutherland* is interesting to note: "There are no occupations, which should be regarded as intrinsically dangerous to mental health" (para. 4). However, Health and Safety Executive data suggests the contrary that the occupations with the highest estimated prevalence rate of work-related stress in GB, averaged over the last three years (2010/11, 2011/12 and 2013/14) were as follows; Welfare and housing associate professionals with 2 830 cases per 100 000 people working in the last 12 months, nurses with 2 630 cases per 100 000 people, teaching and education professionals with 2 310 cases per 100 000 people, administrative occupations: government and related organisations with 2 310 per 100 000 people and customer service occupations with 2 160 cases per 100 000 people working in the last 12 months. These occupations have statistically significantly higher estimated prevalence rates of work-related stress than across all occupations averaged over 2010/11, 2011/12 and 2013/14 (HSE)

### Alleged Factors Causing Harm

The alleged causes of workplace stress cited in litigation included (a) aggressive management style; (b) excessive workload; (c) poor management practice; (d) organizational, economic, or technical change; and (d) bullying or harassment by co-workers. With regard to the nature of workplace stress claims, the largest amount of claims were related to excessive workload (42%), followed by poor management practices (23%), organisational, economic or technical change (15%), aggressive management style (12%), and bullying by coworkers (8%).

### Outcome of Claims

In relation to the outcome of legal claims, case analysis demonstrates that while the law is often regarded as placing significant hurdles before claimants, there is 50/50 chance of success. Case analysis makes it possible to say why individual claims were won or lost and to identify particular characteristics as being associated with success or failure. For example, in cases based on personal injury caused by bullying and victimization by staff, successful cases were often decided on the basis that the employer was vicariously liable for the staff members' acts and accordingly was in breach of duties owed according to common law. In such cases, it was noted that management was lax, staff discipline poor, and organizational management chaotic. Organizations were viewed as creating or permitting a "culture of abuse" with such actions. In cases in which the claimant was unsuccessful in the legal action, the courts often took the view that there was insufficient evidence that anything happened which either did or should have put the defendant employer on notice that the actions taken by its staff over the period in question would or might cause psychiatric or physical harm to the claimant.

Key characteristics in workplace stress cases based on excessive workload were the introduction of changes to working practices by management; problems with communication and consultation between management and staff; increased working hours; increases in the volume of work; and lack of management response to complaints about new working practices.



Many claimants suffer mental illness and depressive conditions due to the strains and stresses of their work situation, be they due to overworking, the tension of difficult and complex relationships, career prospect worries, or fears or feelings of discrimination or harassment. However, the court decisions confirm that unless there was a real risk of breakdown that the claimant's employers reasonably ought to have foreseen and properly ought to have averted, there can be no liability (See Brown LJ, *Garrett v. Camden London Borough Council*, 2001, EWCA Civ 395, para. 63.)

It should be noted that a claimant might be entitled to recover damages with respect to injury to mental health caused by one single episode of acute stress at work, resulting in post-traumatic stress disorder, for example. The majority of successful cases are concerned with chronic stress arising from an accumulation of work-related demands and conditions: for example, see *Walker v. Northumberland County Council* (1995) 1 All ER 737; *Rorrison v. West Lothian College*, (2000) S.C.L.R. 357; *Fraser v. The State Hospitals Board for Scotland* (2001) S.L.T. 1051; and *Cross v. Highlands and Islands Enterprise* (2001) S.L.T. 1060. It is conceivable that an employee might suffer psychiatric illness as a result of one acute episode of stress. The employee might be instructed to undertake a task which could be reasonably foreseen in the particular circumstances to cause psychiatric harm (*Keen v. Tayside Contracts*, 2003, Scottish Cases 55; para. 66; *Corr v. IBC Vehicles Ltd.*, 2008 UKHL 13).

In the context of foreseeability, the question is whether the kind of harm to the particular employee was reasonably foreseeable, not whether psychiatric injury was foreseeable in a person of reasonable fortitude. In order to succeed, a claimant must be able to prove that an employer had such knowledge that would make the injury reasonably foreseeable—not simply that an employee would be distressed or upset or emotionally disturbed by certain circumstances or events, but that the claimant would suffer psychiatric damage (Paton, L., *Keen v. Tayside Contracts*, 2003, Scottish Cases 55; para. 68;). It is insufficient for a claimant to make general allegations about growing awareness of the possibility of psychiatric damage.

One issue for employers to carefully consider is the provision of a counseling service for employees. Case law makes clear that the availability of counseling is a relevant matter to consider in regard to stress at work cases. An employer who offers a confidential advice service with referral to appropriate counseling or treatment services is unlikely to be found in breach of duty (Hatton; Hartman Best). However, it should be noted that in *Dickens v. O2* (2008) EWCA Civ 1144, the Court of Appeal ruled that providing access to counseling might not always discharge the employer's responsibility. Where it is evident that an employee's health may be harmed by stress at work, an employer needs to tackle the cause of the stress rather than merely make the employee aware of a counseling service (Bonino, 2008).

### **Employment Relations Issues**

Where excessive hours were the center of litigation in both successful and unsuccessful cases, there was evidence of changes to organizational policy and working practices that put extra pressure on staff and significantly increased working hours with minimal consultation. It was evident that both the quantity and rate of change resulted in change fatigue and workplace stress (Eriksson, 2004). From an employment relations perspective, an improved system of managing change might have prevented staff dissatisfaction and lengthy and costly court proceedings, for which the time and expense often seemed disproportionate to the substantive issues in the case and the true value of the claim. Greater care needs to be taken by management to isolate the issues causing workplace grievance and deal with them more effectively, rather than letting them spiral out of control.

### **Conclusion**

At a time when the danger of a so-called "compensation culture" spawning a "litigation crisis" has come to dominate much public and political discourse (Williams, 2005, p. 499), it would not be surprising if employers were concerned about judicial decisions that seem to expand the liability for workplace stress. However, from the case analysis, it cannot be plausibly or reasonably argued that employers face mass litigation on the basis of workplace stress. This analysis reveals that an unduly onerous burden on employers has not been created by legal decisions. A claimant has substantial legal and evidential hurdles to overcome. It might be argued that the 50/50 success rates are a reflection that the law is fairly evenly framed. This is perhaps what the courts intended to recognize a duty in limited circumstances only. There must be a risk of mental illness which the claimant's employers ought to have foreseen and which they ought properly to have averted; otherwise the claim must fail. It is also possible that these legal developments have prompted managerial and organizational changes designed to improve the working environment in order to minimize the likelihood of facing claims for workplace stress, so for that reason they could be considered a positive

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