

Sutherland v Hatton

In 2002 the Court of Appeal gave a landmark judgment in four joined stress cases, *Sutherland v Hatton: Somerset County Council v Barber: Sandwell Metropolitan Borough Council v Jones: Baker Refractories Ltd v Bishop* [2002] EWCA Civ 76.

The judgment sets out guidelines on an employer's common law obligations in relation to workplace stress-related illness. In three of the cases, the employers were not liable for their employees' stress-related illnesses. Only with some hesitation, was liability found in the fourth case.

The Court of Appeal's decision signalled the way for employers to take a more robust approach to this type of claim.

The guidelines given by the Court of Appeal in the *Sutherland v Hatton* case are as follows:

- There are no particular control mechanisms for psychiatric illness (such as depression) arising from workplace stress.
- The test is the same whatever the employment. No occupation is to be regarded as intrinsically more dangerous than another to an individual's mental health.
- One of the crucial questions is whether the effects of a stress-related illness were reasonably foreseeable in the individual. The answer depends on characteristics particular to the employee and the demands placed on them by the employer.

Several factors are likely to be relevant in relation to foreseeability:

- Is there an abnormal level of sickness absence within a department or job type?
- Have several employees doing the same job experienced unacceptable levels of stress? Watch out for high performers who, by definition, appear to cope with more than average workloads.
- Warning signs from employees will play a fundamental role in establishing liability because once the employer is on notice of the adverse effects of stress the consequences are more foreseeable. It is therefore essential that employers document complaints and actively consider whether remedial action is necessary.
- Employers will need to be vigilant, looking for the tell-tale signs, although unless they are aware of any particular vulnerability, employers are

entitled to assume that an employee can cope with the "normal pressures" of the job. Whilst vigilance is important, employers are not expected to be clairvoyants. They are entitled to take employees' actions at face value. For example, an employee returning to work after a period of sickness absence, without any further explanation, is usually indicating that he is fit to resume work.

- Once on notice of a potential stress-related illness, the employer needs to take remedial steps. The judgment gives a litany of suggestions: sabbaticals, redistributing work, counselling, buddying.
- A balancing act is involved. An employer will not be expected to redistribute work at the expense of another employee. Neither are steps expected to be taken which are unlikely to do any good. So, according to the Court, where there is no other resolution, if the only effective way of safeguarding the employee may be to dismiss or demote the employee, then the employer may not be in breach of its duty in preventing a willing employee from continuing in their job. Employers should however exercise caution if considering this course of action as it could well amount to a failure to make reasonable adjustments under the DDA.
- Interestingly, the Court said that an employer which offers confidential help (for example in the form of counselling) to employees suffering stress is unlikely to be found in breach of its duty. However it is difficult to see how this step alone will exonerate an employer placing unrealistic demands on a vulnerable employee.

The House of Lords subsequently overturned one of the four cases, *Barber v Somerset County Council* [2004] UKHL 13 and at the same time considered the status of the *Sutherland v Hatton* guidelines.

The House of Lords acknowledged that the guidelines were "useful practical guidance" but emphasised that they did not have statutory force.

Mr Barber was a schoolteacher who took early retirement as a result of a mental breakdown at work. He claimed that his employer was in breach of its duty of care as his breakdown was reasonably foreseeable due to a heavy workload and, further, that his employer should have taken steps to try and prevent the breakdown. Mr Barber did not alert his colleagues to the fact that he was suffering for several months. The first indication was when he took three weeks off work, citing "overstressed/depression" as the reason for his absence. On his return to work, nobody approached him to discuss the illness. Instead he arranged meetings with his head teacher and the two deputy heads, all of whom were largely unsympathetic

and took no steps to improve or consider his situation. The following term Mr Barber's workload increased and he suffered a breakdown.

It was recognised that *Barber* was not a clear case of a flagrant breach of duty. However, Lord Walker, in the leading judgment, held that the Court of Appeal had given insufficient weight to the fact that Barber, a conscientious worker, had taken three weeks off work due to stress and depression. This triggered the duty to take some action. At the very least senior management should have enquired about his problems and made some reduction in his workload. Lord Walker added that Mr Barber's condition should have been monitored, with more drastic action required if it did not improve. Mr Barber was awarded a sum of £72,547.

Barber is yet another reminder to employers that, as soon as they are put on notice of an employee suffering from mental health problems at work, they must take action to try and avoid any escalation of the employee's illness and consequent liability for breach of their duty of care.