Stress, bullying and the law

In part one of a two-part article, Oliver Hyams of **Devereux Chambers** looks at the employer's contractual duties and the employee's statutory rights

Employees suffering from illness as a result of stress are expensive for employers in many ways. Not only is there a financial cost, but also the employer's organisational effectiveness is frequently affected by the absence of the employee, and that in turn puts stress on the employee's colleagues. The problem of stress is a downward spiral.

However, as individuals do not all react in the same way to the same set of circumstances, an employer's duty to its workforce takes effect in different ways in different situations. What would be an invigorating challenge for one employee may be a source of dread for another. Bullying, however, can never sensibly be said to be acceptable.

The first part of this article will examine an employer's duties owed at common law to its employees, and the employees' relevant statutory rights.

The public sector is, in some senses, no different from other employers. However, in parts of the education sector, the existence of statutory inspection regimes may complicate matters. Furthermore, the public interest in the organisation of publicly funded operations – especially when, like the NHS, they are delivering services to members of the public directly – can make employees think that they are justified in 'going public' with their concerns. These factors add spice to an already interesting situation.

Common law duties

Negligence

An employer owes a duty in the law of negligence to its employees. This is an obligation to take reasonable care of its employees' health. This duty was recently restated by the House of Lords in *Barber v Somerset County Council* [2004] as follows:

> ... the overall test is... the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve.

Thus, the Health and Safety Executive (HSE) guidelines are likely to be particularly relevant. The HSE recently issued its Management Standards for Tackling Work Related Stress. These are set out under the headings 'Demands', 'Control', 'Support', 'Relationships', 'Role', and 'Change'. They provide a succinct guide to current thinking about the impact of stress, and reference should be made to them accordingly. It is interesting that they recognise organisational change as a major cause of stress itself. They are available via the HSE's website: www.hse.gov.uk/stress/standards/pdfs/standards.pdf

Implied term of trust and confidence

An employer is also under an obligation not, without reasonable and proper cause (words which are often forgotten, but potentially crucial – *Malik v BCCI* [1998]), to act in a manner which would be likely to destroy or seriously damage the relationship of confidence and trust existing between it and its employees. For example, a merited disciplinary sanction will be likely to seriously damage the relationship of trust and confidence, but if there is reasonable and proper cause for the warning, then there will be no breach of the implied term. An unwarranted suspension which causes mental illness can give rise to liability for breach of the implied term of trust and confidence (see *Gogay v Hertfordshire County Council* [2000]).

The impact of *Johnson v Unisys*

The interplay between the law of unfair dismissal and common law was first considered by the House of Lords in *Johnson v Unisys* [2003], but was recently reconsidered in *Eastwood v Magnox Electric* [2004]. The effect of those cases is that if a personal injury to an employee was caused by their dismissal, no claim can be made at common law for that injury. However, if a completed cause of action has arisen by the time of the employee's dismissal, a claim in respect of that injury may be made, although any exacerbation of the injury caused by the dismissal will not be capable of being compensated for in the personal injury claim. The employee will then have no right to claim damages for the exacerbation since, as the House of Lords simultaneously decided in *Dunnachie v Kingston upon Hull City Council* [2004], compensation for personal injury is not available in a claim of unfair dismissal. The House of Lords recognised the oddity of this, and suggested in *Eastwood* that Parliament should review the situation. This is unlikely to occur, however, and therefore the law in this area can be considered to be reasonably settled.

The right to claim unfair dismissal

A stressed employee (including one who is being bullied) can claim 'constructive' unfair dismissal. This is a right which arises only where the employee's contract of employment has been fundamentally breached or repudiated. A repudiation occurs where the employer has shown an intention to be no longer bound by the terms of the contract in some essential respect, and a fundamental breach is what its name suggests: a serious breach of contract. It has been decided that a breach of the implied term of trust and confidence is necessarily a repudiation of the contract (*Morrow v Safeway Stores* [2002]).

If the employee intends to claim only 'ordinary' unfair dismissal (where the dismissal is not automatically unfair – see below), then they must have a year's continuous employment in order to be able to make the claim. The claim is made to an employment tribunal, and the employee must (since 1 October 2004) show that they have taken certain steps (set out in Schedule 2 to the Employment Act 2002), as specified by the Employment Act 2002 (Dispute Resolution) Regulations 2004. There is a standard procedure and a modified procedure to be followed by the employee or the employer, as the case may be. Thus, for example, if the employee leaves the employment and claims constructive dismissal, the employee must have followed the modified grievance procedure, unless it has, since the ending of the employment, ceased to be reasonably practicable for them to do so.

Additional statutory protections

In a number of situations, a dismissal will be automatically unfair. They will not immediately spring to mind as being relevant in an article about stress and bullying, but the second part of this article will be concerned, in part, with the manner in which an employer can unlawfully victimise an employee who has alleged (in whatever way) that there has been unlawful discrimination, contrary to the various statutory prohibitions on discrimination against employees. The protections discussed in the rest of this article are similar in sort, and are equally relevant: the reader will no doubt have at least heard of situations in which employees who work in the public sector and who have been (as they see it) mistreated, publicise their perceived mistreatment, thinking that it is in the public interest that everyone should know about it merely because the body for which they work is publicly funded. They may be able to rely on one or more of the statutory provisions to which reference will now be made.

Whistleblowing

For example, an employee who is dismissed for 'whistleblowing' will be automatically unfairly dismissed if certain conditions are satisfied. The 'whistleblowing' protections were inserted into the Employment Rights Act 1996 (ERA 1996) by the Public Interest Disclosure Act 1998 (PIDA 1998). There is no period of qualifying service required for the right to claim unfair dismissal for a disclosure of this sort (see ss103A and 108(3)(ff) ERA 1996).

The conditions which need to be satisfied are that there has been a disclosure which 'in the reasonable belief of the worker making the disclosure, tends to show one or more of' a number of breaches of the law (including the criminal law) and several other things (see s43B ERA 1996). This is known as a 'protected disclosure'. The occasions when a disclosure qualifies as a protected disclosure are set out exhaustively in s43B (see box).

An employee also has the right not to be subjected to a detriment as a result of making a protected disclosure (see s48(1A) ERA 1996).

A protected disclosure must be made in accordance with one or more of the circumstances within ss43C-H ERA 1996. An employee who makes the disclosure to their employer will satisfy the requirements of s43C. Many people, however, feel uncomfortable about making allegations of wrongdoing on the part of their employers to their employers. The other persons to whom a disclosure may be made, in order to

PROTECTED DISCLOSURE

Examples of conditions that need to be satisfied for there to be a protected disclosure, according to s43B ERA 1996, include:

- when 'the health or safety of any individual has been, is being or is likely to be endangered';
- when 'a miscarriage of justice has occurred, is occurring or is likely to occur'; and
- when 'the environment has been, is being or is likely to be damaged'.

Perhaps the most comprehensive of the situations which are within s43B is: 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject' (s43B(b)).

attract the protection afforded by the PIDA 1998 provisions, include those who are prescribed in an order made under s43F ERA 1996. The current order is the Public Interest Disclosure (Prescribed Persons) Order 1999 (the 1999 Order). For example, a disclosure may be made to the Audit Commission for England and Wales, or to any auditor appointed by the Commission, to audit the accounts of local government and health service bodies about:

> ... the proper conduct of public business, value for money, fraud and corruption in local government, and health service, bodies.

However, in order to fall within s43F, a disclosure must be made in good faith, and the person making it must reasonably believe:

> (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
>
> (ii) that the information disclosed, and any allegation contained in it, are substantially true.

In *Street v Derbyshire Unemployed Workers' Centre* [2004], the Court of Appeal ruled that it is not enough for a disclosure to be made 'with honest intention' in order for it to satisfy the requirement of good faith. Thus, it is not the purpose of the PIDA 1998 provisions:

> ... to allow grudges to be promoted and disclosures to be made in order to advance personal antagonism.

Auld LJ said, however, that:

> ... an understandable resentment or antagonism that may grow if the matter is not remedied quickly... in itself should not necessarily be regarded as negativing good faith if, when making the disclosure, the worker is still driven by his original concern to right or prevent a wrong.

No reference is made in the 1999 Order to an Ofsted inspection, so a disclosure will be protected by the PIDA 1998 provisions only if it is made under s43G ERA 1996 – which applies only in certain circumstances, for example, when:

> ... at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with s43F...

or s43H. The latter applies to a disclosure which the employee reasonably believes is substantially true, where the 'relevant failure is of an exceptionally serious nature', and where 'in all the circumstances of the case, it is reasonable for [the employee] to make the disclosure'. In the case of both s43G and s43H, the disclosure must not have been made 'for purposes of personal gain'.

So, the protections afforded to employees in the event of 'whistleblowing' are significantly circumscribed.

Other protections

A number of other protections exist for employees who allege wrongdoing on the part of their employers in specific situations. These include the protection afforded to an employee by s45A ERA 1996 against detrimental treatment, on the grounds that the employee:

> ... refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998...

and the right afforded by s46 ERA 1996 against being treated detrimentally:

> ... on the ground that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.

Employee representatives who are not officers of trade unions are protected by s47 ERA 1996 in a similar way. Protection against dismissal for the same reasons is afforded by ss101A, 102 and 103 ERA 1996 respectively.

Employees who are, or seek to become, members of independent trade unions are protected by ss146 and 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 against detrimental treatment or dismissal where it occurs because they are, or are seeking to become, members of trade unions, or because they have taken part, or sought to take part, in the activities of an independent trade union at an appropriate time.

Conclusion

Thus there are some potentially significant protections for employees who are the subject of bullying and harassment. In the second part of this article, consideration will be given to the often overlooked, but potentially very important, protections against victimisation when an employee has alleged that the Sex Discrimination Act 1975, the Race Relations Act 1976, or the Disability Discrimination Act 1995 has been breached. Several worked examples of the potential pitfalls will then be given.

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Barber v Somerset County Council [2004] ICR 457
Dunnachie v Kingston upon Hull City Council [2004] 3 WLR 310
Eastwood v Magnox Electric Plc [2004] 3 WLR 322
Gogay v Hertfordshire County Council [2000] IRLR 703
Johnson v Unisys Ltd [2003] 1 AC 518
Malik v Bank of Credit and Commerce International SA [1998] AC 20
Morrow v Safeway Stores Plc [2002] IRLR 9
Street v Derbyshire Unemployed Workers' Centre [2004] IRLR 687