FORUM OF INSURANCE LAWYERS

IRELAND

Informing Progress - Shaping the Future

FOIL Ireland learning event

Workplace stress claims in an Age of Anxiety

This event was hosted by FOIL Ireland on 16th June and was presented by **Stephan Hanaphy BL**. The slides used can be viewed here https://www.foil.org.uk/update/workplace-claims-in-an-age-of-anxiety/

Recent developments and current trends

The speaker began by reviewing a number of reports in the press (between 11th October 2021 and 3rd May 2022), which illustrated a growing concern about the link between the Covid pandemic and an increase in work related stress.

A particular article in *The Economist* (13th May 2022) was headlined '*How a new age of surveillance is changing work. Look out: your boss may be watching you'.* The article went on to state that '*many studies link excessive individual surveillance to higher levels of stress. And if algorithms trained on biased date are used to make more decisions, the odds of discrimination will rise. One analysis found that AI systems consistently interpret black faces as being angrier than white ones…'.*

The article went on to consider what to do and suggested '*that as law and principle evolve, some principles should govern workplace surveillance. Individuals must be fully informed, as the New York law provides. Some firms now disclose monitoring methods in the fine print of their employee handbooks, and specify what data managers have access to. But there is no substitute for consistent, easily understood information for staff – so they can decide how to behave at work, and whom they choose to work for*'.

The Sunday Times (Ireland 6th June 2022)) had also reported on a number of studies, which included: '*the hypothesis is that the brain inflammation caused by Covid-19 is triggering both psychiatric conditions and neurological symptoms.*

This extract is significant because it highlights the importance of the issue of causation in work related stress claims. It must be proved by the plaintiff that the injury sustained by him/her was caused by or at the workplace. The plaintiff will have a hard task where there are competing possible causes. (See *Quigley* where the claimant claimed that he had been bullied at work. He was dismissed and brought unfair dismissal proceedings, as well as a claim for damages for bullying. It was shown that the plaintiff was stressed not by the bullying but by the unfair dismissal proceedings that he had brought and the claim was dismissed).

Long Covid is therefore something to be borne in mind when considering causation in this type of claim.

The speaker had made a search on the Workplace Regulation Commission's website on 15th June 2022, for cases in which both 'stress' and 'covid' were mentioned and there were 94 hits. (It was stressed that not all of these cases may be of direct relevance). There had been 88 hits at the end of May 2022. This increase of six does appear to be significant.

The case of importance is *McGrath v Trintech (2005) 4 IR 384* in which it was said:
'***The issue is not whether the stress the plaintiff suffered was caused by work, but whether the stress induced injury was a consequence of a breach by the defendant of its statutory duties****. Where an employee is injured because of the malfunction of a faulty piece of equipment given to him by his employer, the causative link is obvious. The injury would not have been inflicted if the faulty piece of equipment had not been given to the employee. The question which arises here is whether it can be said, as a matter of probability, that if the first defendant took all of the steps which the plaintiff contends it was statutorily obliged to take (dealing with workplace stress in the safety statement, having in place a system for monitoring stress and an employee assistance programme and providing further training for the plaintiff) the plaintiff would not have suffered psychological injury. In my view it cannot*'.

This case illustrates the relatively high bar that must be negotiated by the plaintiff to recover damages.

Also of relevance to this test is *Maher v Jabil Global Services Ltd (2008) 1 IR 25.* The judge produced a list of concrete factors to be proved by a plaintiff in order to succeed:

a). Has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress?
b). If so, is that injury attributable to the workplace? and
c). If so, was **the harm** suffered to the **particular employee** concerned **reasonably foreseeable** in all the circumstances?

In *Maher*, the defendant was not on notice that the particular employee, the plaintiff, was likely to suffer the type of injury that he did, arising from the stress of which he complained. Defendants must therefore identify if there were any complaints made by the plaintiff in relation to impending or possible psychiatric injury of the sort the person went on to suffer.

Further assistance comes from the English case of *MacLennan v Hartford Europe Ltd (2012) EWHC 346 (QB)* [followed in *Mackenzie v AA Plc and another (2021) EWHC 160 (QB)*].

The text quoted below has not yet been formally noted in the Irish courts but it informs what the Irish courts mean when they say that a plaintiff must show that his injury was reasonably foreseeable by the employer.

'*(i) It is insufficient for a claimant to show that his employer knew or ought to have known that he had too much work to do, or even to show that he was vulnerable to stress as a result of overwork. To succeed, he must show that his employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm in terms of a psychiatric or other medical condition'.*

To overcome the high bar that this sets, the employee must have told the employer that he was suffering stress; and that the stress would have caused the very type of injury complained of.

(ii) Even then, it is insufficient merely to show that there was a known risk of some psychiatric or other injury in the future. The claimant must show that the employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm of a kind he in fact suffered. Thus, the employer must have knowledge of the imminent risk of the sort of collapse of health that in fact occurred. (iii) An employer is entitled to assume that an employee can withstand the normal pressure of the job unless it is such that employees are known to be at particular risk of injury…

(See *Ruffley*): All employers are entitled to assume that their employees have ordinary robustness. They can be criticised and asked to improve their performance (even in robust terms)).

(iv) Most employees on occasions will be' overworked' and will have problems in 'coping' with their work. However, that does not mean that work necessarily poses a risk to that person's health.

(v) An employer has a duty to act only when the indications of (imminent) harm are plain enough for any reasonable employer to realise that it should do something about it.

(vi) An employer has no general obligation to make searching or intrusive enquiries. And may take at face value what an employee tells it.

The speaker noted that plaintiffs have a tendency to apply hindsight to the situation. They describe the effects of the stress on them, as seen through hindsight, but never told the employer at the time.

(vii) The foreseeability threshold in such claims is therefore high and may prove a formidable obstacle on the facts of a particular case'.

The most recent decision of the High Court is *John Ward v An Post (2021) I EHC 470* allows insight into how these issues may develop in the future.
'*Even where it is proved that a plaintiff has suffered an injury to their health which is attributable to the workplace, the evidence must demonstrate that the harm suffered by the* ***particular*** *employee was reasonably foreseeable in all the circumstances.*

It is also clear from the authorities that it is appropriate for the court to examine the conduct of both parties to the relationship, namely the conduct of the employee as well as that of the employer…'.

The employee also has to act reasonably.

The judge also stated:
'*A careful consideration of the evidence does not support any finding that, as of October 2017, the plaintiff was suffering from a 'significant psychiatric injury'. The evidence, however, does support the proposition that the plaintiff was reluctant to comply with his obligations, specifically his obligation to attend review meetings, which obligation flows from the responsibility of every employee to co-operate with the operation of the ASMP [Attendance Support and Management Process] policy.*

Defendants should look for evidence of plaintiffs not fulfilling their contractual obligations to improve performance or deal with other issues in the workplace.

Ruffley also touched on the fact that the existence of an employment assistance programme, or a confidential advice service, would probably make it unlikely that an employer would be found liable (particularly in relation to workplace bullying). This echoes comments made in the earlier English case of *Hatton.* Such processes are therefore important in trying to prevent claims arising.

Another point arising from the *John Ward* case is the length of time these cases can take to reach court and they invariably involve degrees of animosity. That is why so many now involve mediation. Memories fade and the accuracy of evidence reduces. Are motions to dismiss such claims warranted? The speaker was of the view that this type of claim may be more amenable to such applications than other types of claims.

In *John Ward* the judge said:
'*The plaintiff has proven to be a* ***poor historian****. In the manner explained in this judgment, I have found the plaintiff's evidence to be unreliable in relation to certain issues, each of which is explored in detail in this judgement. Whether any one, or more of the instances of unreliable testimony given by the plaintiff can be explained by the* ***passage of time*** *and by failing memory cannot be known with certainty. Regardless of the explanation, if there be one, I have given extensive reasons as to why, where relevant, I have not found the plaintiff's evidence to be accurate or reliable and it must also be said that poor memory is difficult to understand or accept as an explanation in respect of certain unreliable testimony given by the plaintiff'.*
The passage of time has been the issue in a number of recent High Court cases.

In *Caulfield v Fitzwilliam Hotel Group Limited (2019) IEHC 427* (an application by the defendant to dismiss for want of prosecution) the judge said:
'*It is now necessary to consider 'the balance of justice'. The first matter to be considered is that the nature of the claim which is one for bullying and harassment.* ***Claims of this nature necessarily require the testimony of those who were present or who witnessed the alleged events. These events are alleged to have occurred some ten years ago. A lapse of time of this order must impinge upon the accuracy of those who may give evidence concerning the alleged events****. This amounts to prejudice for the first defendant in defending the claim.*

The claim was struck out.

In *Breen v Wexford County Council (2019) IEHC 112,* in dismissing the claim on the defendant's application, the judge said:
'*Bullying claims more often than not concern multiple events occurring over a protracted period of time as between the plaintiff and the defendant, its servants or agents. Such events are frequently numerous and in the present case cover a two-year period.*
Asking a witness to call to mind a range of events occurring over a protracted period some two decades later is, to use the oft quoted phrase, putting justice to the hazard'.

In the case of *Fox v Cherry Orchard Hospital and HSE (2019) IEHC 285* the court noted:
that there was 'no good excuse' for the inactivity of the plaintiff between November 2015 and July 2018.

The judge commented:
'*Counsel for the defendants has identified 13 witnesses of fact whose involvement may be required at trial. Those witnesses will be asked to testify to events back in 2008. It is difficult to see how their memories of matters 11 or so years ago could remain fully intact, with the result that the defendants may (almost certainly will) be hindered in challenging such factual evidence as the plaintiff may present at trial'.*

To summarise, the speaker considered that:

- Causation and foreseeability have been, and will continue to be, very important factors in work-stress related claims;
- Do not underestimate the significance of an Employment Assistance Programme and similar facilities (the employee must have been told that such a facility existed);

- Relatively long-standing cases may warrant motions to dismiss.

Q&A

Q: What are the factors that have driven the increase in stress claims related to Covid?

A: It is clear from the press that there are a number of crises at present: Covid, housing, various conflicts and other external factors are probably raising peoples' general levels of anxiety. Science has also increased the number of conditions that can be diagnosed and people are more aware of their own mental health, in such a way as to prompt them to consider litigation.

Q: In the speaker's experience, how successful is the mediation process in these cases?

A: Not very, although it seems to be acknowledged that even a failed mediation may have enabled the parties better to distil the issues between them. The speaker felt that is this type of claim they were probably positive in their effect.

A delegate observed that with mediation, plaintiffs were often looking for an apology, or to be recognised or appreciated in some way. Even where the mediation did not produce a settlement, it had a 'social' or 'mental health' benefit.

Q: How can employers successfully defend these types of claims?

A: Matters discussed today are important, as is evidence and he felt that in-person hearings were preferable, where the judge can see the demeanour of the witness properly. Cross-examination can be the key to winning these cases.