STRESS AT WORK
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Intel Corporation (UK) Ltd v Daw [2007] EWCA Civ 70

1 The above appeal represents the most recent significant decision in this field. It is the first case in which paragraphs 17 and 33 of Hatton (on the provision of counselling services as discharging an employer's duty) have been judicially considered. It is probably therefore the most significant appeal since Hatton.

2 The result of the appeal was to uphold the claim by Tracy Daw ("the Claimant") that her serious mental breakdown in June 2001 was caused by overwork, and that the risk of such an occurrence should have been foreseen and acted upon by her employer by early March 2001. The Judgement of Goldring J, the trial judge, is at [2006] EWHC 1097.

3 The Claimant has not worked since her breakdown, suffering from, in the words of Goldring J, a "*long-standing and chronic depression*". The Claimant was accepted by the Defendant to have been an "*outstanding*" employee. Goldring J described her as "*able*" and "*committed*" and "*a very hardworking and conscientious employee*".

4 In brief, the facts were as follows: The Claimant started work for Intel ("the Defendant") in 1988 as a Finance Analyst. Thereafter she held various different accounting and finance related roles. Her first child was born in October 1995. She returned to work full time in January 1996 but was signed off work from March to June 1996 with post natal depression ("PND"). She returned to work part time in July 1996. The Claimant's second child was born in March 1998. She returned to work part time in September 1998 but was once again signed off work with PND, from October 1998 to March 1999.

5 With effect from May 2000, the Claimant reverted to full time work and took on the new role of Mergers and Acquisitions Payroll Integration Analyst. This role involved the integration into the Defendant's payroll systems of the payroll functions of companies acquired by Intel. As the Court found, it was necessarily "an intricate and sensitive process".

6 In summary, thereafter the Claimant's workload increased dramatically. She worked very long hours, including in the evenings and at weekends. Her position was under resourced. The Court accepted that she worked excessive hours, and that those hours were around 60 hours per week. The Claimant had also complained of a lack of clarity in her reporting lines. As to that, the High Court held:

"The real problem was that because of her excessive workload, the demands of those different people added to her stress. It was difficult to decide whose demands should be given priority."

7 The Court accepted that the Claimant told the Defendant that she could not cope with the amount of work that she had to do and that she had made clear the shortfall in resource with the resulting "bottleneck" of work at her part of the integration process. She made around fourteen protests concerning these matters between September 2000 and March 2001.

8 A seminal event occurred in early March 2001. The Claimant was found in tears at her desk by her manager (referred to as "SH"). He asked her to write down what was wrong. She did so, and the concluding paragraph in the document that she prepared said

"I cannot sustain doing the level of work I am currently doing. No one is getting particularly good service, I am not enjoying what I am doing, bureaucracy is stressing me out (evidenced by my violent mood swings – bad sign … been

here before – twice!), HR/PAW are demoralising me and I want out."

9 It was the Claimant's case that that the reference to "*been there before – twice*" was to her two episodes of PND. Her case was that if the Defendant did not know of her impending depression before sight of this document, and the subsequent discussion between her and her manager, then it should have done so then (by asking her for an explanation it did not understand what was written). The Court agreed, and concluded that, in the context of around fourteen previous protests of overwork and related issues.

"…urgent action should have followed...Mrs. Daw's workload should immediately have been reduced...I have no doubt that a company with the resources of Intel could immediately have ameliorated the position as far as Mrs. Daw was concerned. When she finally suffered her breakdown in June 2001 it was able very speedily to ensure the work was done…"

High Court Decision in Daw

10 The Court's decision was interesting for a number of reasons:

(a) the Court considered that an employer's mere knowledge of an employee's history of post natal depression is irrelevant to foreseeability (i.e. it is not an indicator to an employer of a vulnerability to depressive illness generally, albeit that it is such an indicator to the medical profession);

(b) the Court found that, on the facts of this case, the existence of a confidential counselling service was not an adequate discharge of duty; and

(c) it substantially discounted the Claimant's award of damages to reflect a pre-existing vulnerability to mental illness. After

discounts, the Claimant's award, including interest and before the CRU deduction, was £134,545.18.

11 Aspects (a) and (c) above represented illuminating demonstrations of uncontroversial law. That at (b) was, to the knowledge of the writer, the first judicial consideration of the relevance of a confidential counselling service since Hatton. As explained below, it has now additionally had the benefit of a reconsideration by the Court of Appeal.

What Hatton said about Counselling Services

12 According to Hale LJ, as she then was:

> *"17…we do know of schemes…which recognise and respond to the peculiar problems presented both to employees and employers. The key is to offer help on a completely confidential basis. The employee can then be encouraged to recognise the signs and seek help without fearing its effect upon his job…responsibility for accessing the service can be left with the people…best equipped to know what the problems are…and if reasonable help is offered either directly or through referral to other services, then all that reasonably could be done has been done…an employer who does have a system along those lines is unlikely to be found in breach of his duty of care towards his employees…*
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> *33. It is essential…once the risk of harm to health from stresses in the workplace is foreseeable to consider whether and in what respect the employer has broken that duty…in every case it is necessary to consider what the employer…should have done…an employer who tries to balance all [the] interests by offering confidential help to employees who fear that they may be suffering harmful levels of stress is unlikely to be found in breach of duty; except*

where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear."

What the High Court in Daw said about Counselling Services

13 According to Goldring J:

"Mr. Moore submits that it is not the law that a large employer can in effect buy off a future duty by a before the event counselling service. On the facts of this case this counselling service could be of little or no help to Mrs. Daw. It could not, as any reasonable employer would have known, do anything to reduce her problem. It could not reduce the workload. As Mrs. Daw has stated its scope is limited. The demands were totally unreasonable and the risk of harm was clear.

"Whether in any given case the counselling service provided will be enough to discharge the reasonable employer's duty must depend on the facts of each case. Mrs. Daw sets out the limitations of the counselling service. She cannot reasonably be criticised for not using it. By the end of the conversation with SH in the beginning of March 2001 the defendant ought to have known that the demands upon her were in the circumstances totally unreasonable and that the risk of harm to Mrs. Daw's health was clear. A short term counselling service could not have done anything to ameliorate that risk or help Mrs. Daw cope with it. It could not reduce her workload. The most it could have done is advise her to see her doctor. It does not seem to me that on the facts of this case the service provided was a sufficient discharge of the defendant's duty."

What the Court of Appeal In Daw said about Counselling Services

14 According to Pill LJ (with whom Wall and Richards LJJ agreed)in paragraphs 43 and 45 of the Judgement:

"There will be cases in which an employee may be expected to take refuge in counselling services. The problems of this capable and loyal employee could, however, as the judge found, be dealt with only by management reducing her workload. The judge was entitled to find that, in the context of frequent complaints by the respondent of "overwork and conflicting pressures upon her", urgent action was required of the appellants immediately upon receipt of the early March 2001 memorandum...

A very considerable amount of helpful guidance is given in Hatton. That does not preclude or excuse the trial judge either from conducting a vigorous fact-finding exercise, as the trial judge in this case did, or deciding which parts of the guidance are relevant to the particular circumstances. The reference to counselling services in Hatton does not make such services a panacea by which employers can discharge their duty of care in all cases. The respondent, a loyal and capable employee, pointed out the serious management failings which were causing her stress and the failure to take action was that of management. The consequences of that failure are not avoided by the provision of counsellors who might have brought home to management that action was required. On the judge's findings, the managers knew it was required."

15 Paragraphs 17 and 33 of Hatton were surely overdue for fresh consideration. Many practitioners have felt that they could be a source of injustice for employees, or a trap for unwary employers.

16 We were not the only ones. Permission to appeal had been refused by the trial judge, and by the Court of Appeal on paper. However, in granting the oral application, Wilson LJ invited argument on whether paragraph 17 of Hatton needed "*qualification or refinement*".

17 Such qualification or refinement has now been received. It is now abundantly clear that employers cannot assume that provision of a counselling service is akin to a before the event insurance policy behind which refuge can be taken when things go wrong.

The Relevance of the Working Time Regulations in Stress Cases

18 In a number of cases involving allegations of overwork/long hours, reliance has been placed on Regulation 4 of the Working Time Regulations 1998:

"…Unless his employer has first obtained the worker's agreement in writing to perform such work, a worker's working time, including overtime, in any reference period which applicable in his case shall not exceed an average of 48 hours for each of seven days…

…An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies and shall keep up to date records of all workers who carry out work to which it does not apply by reason of the fact that the employer has obtained the worker's agreement as mentioned in paragraph (1)."

19 The fact of the Regulations was considered to be generally relevant (in the Claimant's favour) to the issue of foreseeability in Hone v Six Continents Retail Limited [2006] IRLR 49 (the employee succeeded).

20 However, it is possible to overstate the significance of this decision. In Pakenham-Walsh v Connell Residential (Private Unlimited Company) and anor [2006] EWCA Civ 90 the Court of Appeal upheld a decision that an employee's psychiatric injury had not been caused by work-related stress and, even if it had been, the injury had not been reasonably foreseeable. The employee had voluntarily worked additional hours and had not

complained about stress levels. As regards the Regulations, the Court held that while the employer's failure to comply with the Regulations provided a favourable background for the employee's case, it did not in itself establish a breach of the employer's common law duty. All the facts need to be considered when assessing whether a psychiatric injury from stress at work is reasonably foreseeable. Moreover, the facts in the instant case were very different from (and less serious in terms of the degree of overwork than) those in Hone.

21 The employee also failed to establish reasonable foreseeability in Sayers v Cambridgeshire County Council [2006] EWHC 2029, despite relying on working in excess of 48 hours per week. Her failure to establish reasonable foreseeability meant that her claims for breach of contract based on the implied duty of trust and confidence and on the contractual term implied by the 48 hour limit in the Regulations failed.

22 Significantly, the Court rejected the employee's argument that the 48 hour limit gives rise to an action for damages for breach of statutory duty (which, in accordance with established principles on breach of statutory duty) would not require foreseeability.

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