STRESS, BULLYING AND HARASSMENT AT WORK
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WHAT IS BULLYING?

ACAS:

“There are many definitions of bullying and harassment. Bullying may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient.”

Government website:

“Bullying and harassment is behaviour that makes someone feel intimidated or offended …”

The law

Unlike “harassment” there is no legal definition of bullying. However, there are individual cases in which an Employment tribunal or a court has decided that an employee has been bullied in the workplace.

IS THERE A LEGAL BASIS FOR A CLAIM OF “BULLYING”?

Unlike harassment there is no legal claim for “bullying” by itself.

There is only a claim insofar as there is a breach of a right contained within a statute - for example the right not to be constructively dismissed (Employment Rights Act 1996) or the right not to suffer discrimination, harassment or victimisation (Equality Act 2010).

In practice many claims of bullying are labelled as “harassment” and a claim pursued for harassment

The definition of harassment is considered in detail below.
EXAMPLES OF BULLYING AND HARASSMENT

Although bullying and harassment are not the same thing in law; in practical terms they are often very similar or the same.

One of the main differences between the two is that in law harassment will only take place where the individual has suffered due to their protected characteristic (such as race, age, gender and sexuality - see further below).

Behaviour that is considered bullying by one person may be considered firm management by another. Most people will agree on extreme cases of bullying and harassment but it is sometimes the ‘grey’ areas that cause most problems. It is good practice for employers to give examples of what is unacceptable behaviour in their organisation and this may include:

- spreading malicious rumours, or insulting someone (particularly on the grounds of age, race, sex, disability, sexual orientation and religion or belief)
- copying memos that are critical about someone to others who do not need to know
- ridiculing or demeaning someone – picking on them or setting them up to fail
- exclusion or victimisation
- unfair treatment
- overbearing supervision or other misuse of power or position
- unwelcome sexual advances – touching, standing too close, display of offensive materials, asking for sexual favours, making decisions on the basis of sexual advances being accepted or rejected
- making threats or comments about job security without foundation • deliberately undermining a competent worker by overloading and constant criticism
- preventing individuals progressing by intentionally blocking promotion or training opportunities.

Bullying and harassment are not necessarily face to face, they may be by written communications, visual images (for example pictures of a sexual nature or embarrassing photographs of colleagues), electronic email (so called ‘flame-mail’), phone, and automatic supervision methods – such as computer recording of downtime from work, or recording of telephone conversations – if these are not universally applied to all workers.
Bullying and harassment can often be hard to recognise – they may not be obvious to others, and may be insidious. The recipient may think ‘perhaps this is normal behaviour in this organisation’. They may be anxious that others will consider them weak, or not up to the job, if they find the actions of others intimidating. They may be accused of ‘overreacting’, and worry that they won’t be believed if they do report incidents.

People being bullied or harassed may sometimes appear to overreact to something that seems relatively trivial but which may be the ‘last straw’ following a series of incidents. There is often fear of retribution if they do make a complaint. Colleagues may be reluctant to come forward as witnesses, as they too may fear the consequences for themselves.

They may be so relieved not to be the subject of the bully themselves that they collude with the bully as a way of avoiding attention.

WHAT STEPS SHOULD AN EMPLOYEE TAKE?

Employees should see if they can sort out the problem informally first. If they cannot do so, they should talk to their:

- manager
- human resources (HR) department
- trade union representative

If this doesn’t work, they can make a formal complaint using their employer’s grievance procedure.

They could also call the Acas (Advisory, Conciliation and Arbitration Service) helpline for advice (contact details below).

If this doesn’t work and they’re still being harassed, they can bring a claim in an Employment Tribunal.

WHAT ARE AN EMPLOYER’S RESPONSIBILITIES?

Employers are responsible for preventing bullying and harassment - they can be liable for any harassment suffered by their employees.
Having anti-bullying and harassment policies can help prevent problems. Acas has produced a booklet for employers, including advice on setting up a policy as well as how to recognise, deal with and prevent bullying and harassment.

Bullying and harassment are not only unacceptable on moral grounds but may, if unchecked or badly handled, create serious problems for an organisation including:

- poor morale and poor employee relations
- loss of respect for managers and supervisors
- poor performance
- lost productivity
- absence
- resignations
- damage to company reputation
- tribunal and other court cases and payment of unlimited compensation.

It is in every employer’s interests to promote a safe, healthy and fair environment in which people can work.

**WHAT SHOULD MANAGEMENT DO?**

What if a member of your team informs management they are being bullied?

The policy should include definitions of what your organisation regards as standards of acceptable behaviour. The first step for staff who feel they are being bullied is most likely to have an informal discussion with you as their line manager, or a designated colleague, to explore their concerns. Other steps include:

- informally raising the issue with the alleged ‘bully’
- mediation
- making a formal complaint
- legal action

**Be sensitive, objective, and seek information**

Encourage the member of staff to describe examples of the alleged bullying and what outcome they would like to see. To be fair to both parties, you need to decide whether the behaviour is bullying or harassment. The alleged ‘bully’ may have no idea about the effect their behaviour is causing. Malicious allegations can also happen.

**Identify a way forward**

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Many cases of bullying can be resolved informally – you may wish to approach the people concerned confidentially to explore and discuss the allegations and work out a way forward. For more serious matters, you will need to seek the support of your organisation's harassment advisors, human resources team, other organisational support services, or outside organisations. In serious cases, the staff member may wish to make an informal or formal complaint, or even take legal action.

Options for tackling the problems

Depending on the circumstances, bullying and harassment can be tackled in a number of ways. These include:

- an agreement between the parties on standards of behaviour
- mentoring
- performance management
- training
- transfer of staff
- rehabilitation, including emotional support

What should a manager do if they suspect an employee is being bullied?

Consult your organisation's bullying and harassment policy

Your first port of call should be your bullying policy. This will give you advice about how your organisation approaches bullying, harassment and unacceptable behaviour, and the steps you should follow. It may include advice on how to approach the person you are concerned about, or point you in the direction of trained harassment advisors or others who can support both you and the member of staff.

Be sensitive

Raising bullying or harassment issues with one of your staff can be very uncomfortable – for them and you. It may be that you've misinterpreted the situation, and the person you think is being bullied does not perceive any unacceptable behaviour at all. The relationship that you have with your staff depends on many factors such as personality, management style and the culture of the team or organisation.

How managers tackle this issue may be very different. One way would be to create the atmosphere and circumstances for the individual to raise the problem themselves – you could perhaps ask open questions such as 'how are things going?'

How can you stop bullying and harassment in your team?

Responsibility for dealing with bullying and harassment rests with the organisation, and prevention strategies must be organisation-wide. Many organisations adopt a zero
tolerance approach, and this requires full support from management – including line managers.

Some factors associated with bullying include:

- perceived imbalance of power
- 'bully' thinks they can get away with it
- internal competition where reward systems focus solely on outputs
- organisational change

As a line manager, you may want to tackle some of these factors by, for example:

**Communication**
- ensuring the management style is collaborative and not autocratic
- consulting staff regularly and keeping them informed during times of change

**Training**
- encouraging staff to attend diversity training

**Policy**
- publicising your organisation’s bullying and harassment policy
- explaining the consequences of bullying within the organisation

**Management**
- encouraging control and choice for staff, as far as possible
- exploring levels of competition between individuals and teams
- considering alternative incentives to achieving high performance
- ensuring you are confident and comfortable in managing poor performance
WHAT IS HARASSMENT?

The Equality Act 2010 s 26 adopts a broad approach in relation to the definition of harassment, which applies to conduct 'related to' a protected characteristic, with no need for that characteristic to be that of any particular person (see note (3) below).

The definition is as follows:

s26(1)

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

s26(2)

A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

s26(3)

A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.
Note (1): Marriage and civil partnership and pregnancy and maternity are not included as protected characteristics in respect of harassment, although it is not hard to see how discrimination relating to these protected characteristics might also amount to direct discrimination on those grounds and/or unlawful harassment by reference to other protected characteristics, see Nixon v (1) Ross Coates Solicitors, (2) Coates UKEAT/0108/10 (6 August 2010, unreported) where the EAT held that rumours and gossip relating to an employee’s pregnancy and the possible paternity of her unborn child could both amount to unlawful pregnancy discrimination and unlawful sexual harassment.

Note (2): The Equality Act 2010 extends the protection against third-party harassment (ie such as that from a customer or contractor) to all other protected characteristics (not just sex as had previously been the case), so that an employer might face liability if third-party harassment has occurred on at least two previous occasions and the employer has failed to take reasonably practical steps to stop it (EqA 2010 s 40).

Note (3) The definition of harassment under the Equality Act 2010 is divided into three main types. The first type applies to all the protected characteristics, save marriage and civil partnership and pregnancy and maternity, and involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive atmosphere for the complainant or violating the complainant's dignity. The second type is sexual harassment, which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type. The third type is treating someone less favourably because they have either submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.

General guidance

The EAT (Underhill P presiding) in the context of a race discrimination case, Richmond Pharmacology v Dhaliwal [2009] IRLR 336, made it clear that the approach to be taken to harassment claims should be broadly the same, regardless of the particular form of discrimination in issue. The EAT observed that, in each context, ‘harassment’ is now (both pre and post Equality Act 2010) specifically defined in a way that focuses on three elements:

(1) unwanted conduct;

(2) having the purpose or effect of either:

(i) violating the claimant's dignity; or

(ii) creating an adverse environment for her; or

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(3) on (pre Equality Act) or related to (post Equality Act) the prohibited grounds (ie of sex, race and so on).

Although many cases will involve considerable overlap between these elements, the EAT held that it would normally be a 'healthy discipline' for tribunals to address each factor separately and ensure that factual findings are made on each of them.

In *Nazir and Aslam v Asim and Nottinghamshire Black Partnership* UKEAT/0332/09, [2010] ICR 1225, [2010] EqLR 142, the EAT adopted these questions but gave particular emphasis to the last, ie whether the conduct related to one of the prohibited grounds. Indeed, without seeking to part company with the approach laid down in *Dhaliwal*, the EAT in *Nazir* urged that, when considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation, at the second stage, once the burden of proof has passed.

In *Dhaliwal*, the EAT went on to make the following four general points:

(1) Older case law decided before the modern statutory coverage is 'unlikely to be helpful'. Similarly, assistance is not to be sought from the 'entirely separate provisions' of the *Protection from Harassment Act 1997*.

(2) The alternative bases in element (2) above of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not his purpose (and vice versa).

(3) In each case, there is a proviso that means that, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. There is of course a subjective element (‘... having regard to … the perception of that other person …’) but ultimately the proviso can deal with cases of unreasonable proneness to take offence. Although 'purpose' is not determinative, it can be a factor: 'the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt' (para 15). Ultimately this is all 'quintessentially a matter for the factual assessment of the tribunal'.

(4) Element (3) above ('on the grounds that' or 'by reason that') is a separate element. For example, a person may intend to wound, but not on racial grounds. Whether the latter is present is a well-known question to tribunals. Sometimes it requires an inquiry into the respondent's 'mental processes' but in other cases it can be seen as inherent in the conduct itself.

The guidance in *Dhaliwal* is significant, especially for tribunals, and the judgment bears reading in full. The end result was that the tribunal was entitled to find harassment on the
facts, but the EAT concluded with a warning that the concept of harassment does have its boundaries:

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award."

The point being made is illustrated in a subsequent decision of the EAT, in which Underhill J again presided. The complainant in Heafield v Times Newspapers Ltd UKEAT/1305/12, [2013] EqLR 345, [2012] All ER (D) 265 (Feb), was working as a casual sub-editor in a newsroom at the time of the Pope's 2010 visit. An exasperated editor, trying to put a story together, shouted across the newsroom 'Does anyone know what's happened to the f… g Pope?'. The claimant, unknown to the editor, was a Roman Catholic and sued the newspaper for harassment under the (then in force) Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660 reg 5, particularly para (1)(b) on 'adverse environment'. The employment tribunal held that there had been unwanted conduct, but that the necessary purpose or effect had not been present. Further, it was held that (citing the 'culture of hypersensitivity' passage from Dhaliwal set out above), in any event, any insult felt by the claimant was not reasonable and it was doubted whether the conduct was by reason of the claimant's religion. The EAT (Underhill J again presiding) rejected Mr Heafield's appeal. While it is enough that a remark can have the proscribed effect, it remains the case in practice that the purpose of the remark can still be relevant, in establishing the all-important context of the remark in question. The EAT recognised that this can be a difficult area but felt that, on the whole, employment tribunals can be generally trusted to strike the right balance.

The claim

Given that harassment can be a free-standing cause of action under the anti-discrimination legislation, care must be taken to ensure this is clear in any tribunal claim, just as claims of direct and indirect discrimination (Ali v ONS [2005] IRLR 201, CA) or of direct discrimination and discrimination by way of victimisation (Bryant v Housing Corporation [1999] ICR 123, (1998) Times, 1 June, CA) should be separately 'pleaded' in the particulars of claim.

Unwanted conduct

Unwanted

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Knowing how and where to draw the line between lawful and unlawful conduct is particularly difficult when the same incident can be viewed in totally different ways by the parties involved. What is one man's 'playful flirting', may be unwelcome and demeaning harassment to his female colleague.

An event showing sexual interest may not itself be unlawful, but it can be important in showing the existence of a continuing regime of harassment. See, for example, Fearon v The Chief Constable of Derbyshire UKEAT/0445/02, [2004] All ER (D) 101 (Jan).

In Reed v Stedman [1999] IRLR 299, EAT. Ms Stedman resigned because she found working for her male manager intolerable because of a series of sexual remarks, actions and innuendos. Her claim of sex discrimination was upheld even though no single incident was in itself enough to constitute harassment. What was important was that the series of events could be looked at as a whole. In upholding the ET's decision, Morison P gave some useful general advice on the meaning of harassment, and in particular what is 'unwanted' conduct:

'... A woman may appear, objectively, to be unduly sensitive to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would be whether by words or conduct she had made it clear that she found such conduct unwelcome. It is not necessary to make a public fuss to indicate her disapproval, walking out of the room may be sufficient. Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward and may say the victim was oversensitive.'

Whitley v Thompson (EAT/1167/97 (14 May 1998, unreported), EAT. The EAT refused to find that an employer's act of giving a 'light peck or kiss' to a young female member of his staff was necessarily a 'detrimen' for the purposes of the SDA 1975, even though the attention was unwanted. Lindsey J stated:

(a) A characteristic of harassment is that it undermines the victim's dignity at work and constitutes a detriment on the grounds of sex; lack of intent is not a defence.

(b) The words or conduct must be unwelcome to the victim and it is for her to decide what is acceptable or offensive. The question is not what (objectively) the tribunal would or would not find offensive.

(c) The tribunal should not carve up a course of conduct into individual incidents and measure the detriment from each; once unwelcome sexual interest has been displayed, the victim may be bothered by further incidents which, in a different context, would appear unobjectionable.

(d) In deciding whether something is unwelcome, there can be difficult factual questions for a tribunal; some conduct (eg sexual touching) may be so clearly unwanted that the woman does not have to object to it expressly in advance. At the other end of the scale is conduct which normally a person would be unduly sensitive to object to, but because it is for the individual to set the parameters, the question becomes whether that individual has
made it clear that she finds that conduct unacceptable. Provided that that objection would be clear to a reasonable person, any repetition will generally constitute harassment.

In the DTI explanatory notes on the EE(R)R 2003 SI 2003/1660 and the EE(S)R 2003 SI 2003/1661, the following is offered by way of guidance on this question:

““The definition of harassment requires that the conduct in question is unwanted by the complainant. This does not mean that the complainant is always required to make clear that he finds certain conduct or language unacceptable. For example, there may be many cases where it will be perfectly clear that offensive remarks about persons … are unwanted by those persons. However, it does mean that where for example a person is engaged in light-hearted banter and makes such remarks about her own orientation or belief, it may not be considered as unwanted if another person simply repeats those comments to her in the same context.’

Tribunals will, however, no doubt be sensitive to the fact that those who appear to 'go along with' office 'banter', or other conduct or language that makes reference to certain of the protected characteristics, may well in fact find it offensive but do not wish to stand out or have other reasons for not raising a complaint. Indeed, where there is a culture of banter that could be found offensive, it may be all the more difficult for an employee — particularly a junior member of staff or someone in a minority in terms of the protected characteristic in question – to do anything other than appear to take it in good part. It can be a difficult balance for employers. However, as the EC Code of Practice on Measures to Combat Sexual Harassment (annexed to the Commission Recommendation on the protection of the dignity of men and women at work 92/131) noted, it is often 'a distinguishing characteristic of sexual harassment … that employees subjected to it often will be reluctant to complain. An absence of complaints does not necessarily mean an absence of sexual harassment'."

And, what goes for sexual harassment is no doubt true for the other protected characteristics in this regard.'

Finally, harassment does not, of course, require that the protected characteristic in issue cannot be shared by both perpetrator and victim (or, even, neither of them). If, for example, a male employee treats another male in a sexually abusive fashion this can be unlawful discrimination in circumstances where he would not have treated a female colleague in the same way. The kind of same-sex contact and attempted contact that formed the basis of the complaint of harassment upheld in Walker v BHS Ltd [2005] All ER (D) 146 (May), EAT, would suffice under the new law, as it did under the old. And, under the Equality Act 2010 it is expressly provided that the characteristics of the alleged discriminator will be irrelevant to the question of liability (EqA 2010 s 24).

**Conduct**

'Conduct' can be physical or oral and can cover messages and images contained in documents or sent by email or distributed or displayed by other means. In certain circumstances, suspending an employee on full pay might constitute harassment, even

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allowing for the fact that such suspension is usually a neutral act, see Prospects for People with Learning Difficulties v Harris UKEAT/0612/11, [2012] EqLR 781, EAT.

In this case Ms Harris was a support worker caring for adults, employed by the respondent, who was herself disabled in that she suffered from a rare congenital musculoskeletal condition, arthrogryposis, which affected her joints and resulted in weakness and stiffness. In 2009, training requirements were imposed that meant that Ms Harris would need to be able to perform CPR when she next had to renew her first-aid certificate, which was in March 2010. Given her inability to perform CPR (due to her disability), Ms Harris was unable to pass the course and was consequently suspended by the respondent on full pay, without any prior conversation with her about this. She was again suspended after risk assessments had been carried out in August 2010, again without any prior discussion. The ET held that the two suspensions amounted to acts of unlawful harassment. The EAT agreed. Although suspension of an employee can be necessary for a variety of reasons and would not normally constitute an act of harassment, on the particular facts of the present case, the suspension was far removed from the generality of cases. The apparent lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.'

Provided the other requirements are met, the conduct in question does not even have to be specifically directed at the complainant, see Moonsar v Fiveways Express Transport Ltd [2005] IRLR 9, EAT, where the downloading of pornographic images by Ms Moonsar's male colleagues, who viewed them in her presence, was held to be sufficient to amount to unwanted conduct, as the images were viewed on screens in a room where she worked and she was aware of what was happening. On the other hand, the fact that the conduct in question was not directed at the complainant might be a relevant factor to take into account when determining whether an intimidating, hostile, degrading, humiliating or offensive environment was created, see Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT.

Although a complaint of 'harassment' carries the implication of conduct persisting over a period of time, there is no requirement that this be so. A single act, if of sufficient seriousness, can be enough:

'Bracebridge Engineering Ltd v Darby [1990] IRLR 3, EAT: Mrs Darby was assaulted by supervisory staff in the office of the factory where she worked. Her legs were placed around the body of one of the two men who were assaulting her, and one of the men placed his hand up her skirt and made an obscene remark. After a failure on the part of the management to investigate the incident properly she resigned and claimed in respect both of constructive dismissal and unlawful sex discrimination. She won on both complaints, receiving £3,900 compensation for unfair dismissal and £150 for sex discrimination. In the words of Wood P, giving the judgment of the court, 'We would deplore any argument that could be raised that merely because it was a single incident—provided it is sufficiently serious, I think one must say that—that it could fall within the wording of the subsection'.

Insitu Cleaning Co Ltd v Heads [1995] IRLR 4, EAT: Mrs Heads was subjected to a grossly offensive sexual remark ('Hiya, big tits') by a manager, half her age. She established that this was unlawful sex discrimination. The EAT rejected the argument that an act could not Nationwide Employment Lawyers enquiry@natemplaw.co.uk 08445 715 169
be said to be 'unwanted' (the term used in the EC Code of Practice) until it had first been proffered and rejected, and also held that Mrs Heads had shown she had suffered the necessary detriment. The EAT took note of the difference in the ages between the perpetrator of the act and Mrs Heads, and also the fact that he was in a position of managerial responsibility over her.

*Hereford and Worcester County Council v Clayton EAT/692/95, (1996) Times, 8 October, EAT:* A fire brigade divisional officer had said to his watch 'The good news is that you are getting someone else for the watch, the bad news is that it is a woman'. The finding by the tribunal that the making of this remark, even although not made to Ms Clayton, amounted to a detriment, was upheld by the EAT.’

**Purpose or effect**

Harassment will be unlawful if the conduct had *either* the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. It is to be noted that this provides a potentially broader protection than required by EC law, which requires the conduct in question to have *both* the stated purpose *and* effect.

A claim based on 'purpose' would plainly require an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was; the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused, as it does in other areas of discrimination law.

Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

This approach requirement reflects guidance given by the EAT in *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In *Driskel* the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered (and see *Thomas Sanderson Blinds v English UKEAT/0316/10*, [2011] EqLR 688, EAT for how that might work to the disadvantage of the complainant). That said, harassment giving rise to the defined effect...
may arise as a result of nicknames, teasing, name calling or other behaviour even when this is carried on without malicious intent. In this respect, the Acas advisory booklet *Tackling discrimination and promoting equality—good practice guide for employers* provides examples of the type of conduct which may amount to harassment (see [acas.org.uk](http://acas.org.uk)).

In determining whether the unwanted conduct has created an intimidating, hostile, degrading, humiliating or offensive environment, an employment tribunal must bear in mind that an 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. So held the EAT (Langstaff P presiding) in *Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT*.

*Weeks v Newham College of FE UKEAT/0630/11, [2012] EqLR 788, EAT*: Ms Weeks was employed as a teacher at Newham College. One of her colleagues had, in 2006, circulated a sexist (and generally offensive) animated cartoon and, on various occasions, had used gender specific and sexist terms ('girlie chat', 'the principal's harem', 'power-dressed women' and the like). Applying the three-step set out by the EAT in *Richmond Pharmacology Ltd v Dhaliwal*, the ET had concluded that the conduct in question did not amount to unlawful harassment. Although the cartoon and the remarks were 'unwanted conduct', they did not have either the purpose or effect of creating the adverse environment required. On appeal by Ms Weeks, the EAT upheld the ET's decision, holding that the ET had been entitled to take into account that most of the conduct in question was not specifically directed at the claimant, the phrases were only occasionally used and there was no contemporaneous complaint against them. As for the cartoon (which was undoubtedly offensive, disgusting and unacceptable), the tribunal's task was to judge its impact in the workplace and upon the claimant in particular and, although unwanted, the ET had been entitled to judge that it had not created the prohibited environment for her. While a single act or single passage of actions may be so significant that its effect was to create the proscribed working environment, it did not follow that every such act would, of itself, be sufficient to require such a finding in every case. Ultimately, findings of fact in harassment cases had to be sensitive to all the circumstances; context was all-important. Whether the conduct was directed at the complainant could be a relevant factor. The fact and/or timing of any objection might also be relevant, although the absence of immediate complaint might be for personal, social or cultural reasons and would not, of itself, mean that the case before the ET was unjustified. An 'environment' is a state of affairs and a tribunal must consider the relevant words in context, including other words spoken and the general run of affairs within the workplace.'

**On or related to the prohibited grounds**

While there is no requirement for the complainant to put forward a comparator (hypothetical or real), conduct which is seen by the tribunal as not taken on the ground of the relevant protected characteristic (or, in the case of sexual and gender reassignment harassment on the ground that the victim has rejected or submitted to the perpetrator's unwanted conduct that has violated the victim's dignity or produced an intimidating, hostile,
degrading, humiliating or offensive environment for them) will not fall within the definition. Under the Equality Act 2010, the language used is 'related to' rather than 'on the grounds of' the prohibited grounds, although this was intended to be a clearer use of English rather than to represent any substantive change in the law.

It is no part of the principle of equality that antisocial behaviour in the workplace should be punished, however unacceptable that behaviour may be in itself. In Brumfitt v Ministry of Defence [2005] IRLR 4, EAT, (a decision under the pre-amendment SDA 1975) the need for comparative disadvantage defeated a claim which was made by a woman who complained of offensive language delivered to her as a member of a mixed-sex audience. There was no doubt that she had been exposed to language that she found offensive, but she had not been exposed to this because she was a woman. And see, to similar effect, Loosley v Moulton and anor UKEAT/0468/04, [2005] All ER (D) 62 (Jun). An outcome that seems still to be correct, even under the widened definition of harassment now contained in the legislation, see Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09, [2010] ICR 1225, [2010] EqLR 142, EAT.

Unlawfulness falling outside anti-discrimination legislation

Protection from Harassment Act 1997—generally

Harassment may also give rise to civil liability in ways that fall outside the scope of the anti-discrimination statutes. The Protection from Harassment Act 1997, in addition to creating criminal liability for offences of harassment, has made it a civil wrong to pursue a course of conduct which amounts to harassment and which a reasonable person, possessed of the same information as the alleged harasser, would think amounted to harassment. Such behaviour may be restrained by court order, and may, in cases where loss or injury results, give rise to a duty to compensate by way of damages. Damages for anxiety caused is specifically (PHA 1997 s 3(2)) stated to be recoverable for this wrong.

A feature of liability under the 1997 Act is that the necessary fault is objectively defined in terms of the knowledge of the reasonable man or woman.

Thus the test is not whether the alleged wrongdoer knew that they were committing harassment (something which will often be difficult to prove if the harasser is convinced that their attentions are really welcomed by their victim), but whether this would have been how a reasonable person saw the behaviour in question. In Dowson v Chief Constable of Northumbria Police [2010] EWHC 2612 (QB), [2010] All ER(D) 191 (Oct), the following tests were laid down for a claim under the Protection from Harassment Act to succeed: (1) there must be conduct which occurs on at least two occasions, (2) which is targeted at the claimant, (3) which is calculated in an objective sense to cause alarm or distress and (4) which is objectively judged to be oppressive and unacceptable. In addition, (5) what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs, and (6) a line is to be drawn between conduct which is unattractive and unreasonable, and conduct which amounts to the civil tort of harassment, ie torment of the victim of an order which would sustain criminal liability.

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More generally, it should be noted that the focus of the 1997 Act is on a course of conduct; thus the question is whether there has been a course of conduct that amounts to harassment rather than whether the acts complained of taken individually would do so, see Marinello v City of Edinburgh Council [2011] IRLR 669, CS.

**Vicarious liability for claim under PHA 1997**

An employer can be vicariously liable under the Protection from Harassment Act 1997 for harassment carried out by an employee acting in the course of their employment (see Majrowski v Guy’s and St Thomas’s NHS Trust [2006] UKHL 34, [2006] IRLR 695, [2006] ICR 1199, HL). The employer will only be liable under the 1997 Act for harassment occasioned by the acts of two or more employees if there is a link between the conduct of each such individual—eg they were acting in concert with one another or one was acting under another’s instructions—because random acts by different individuals, done at different times, with no connection or link between them, cannot amount to a ‘course of conduct’ (see Dowson v Chief Constable of Northumbria Police [2009] EWHC 907 (QB)).

Similarly, a partnership, or other unincorporated body, may be made a defendant to a claim of harassment under the PHA, see Iqbal v Dean Manson [2011] EWCA Civ 123, [2011] IRLR 428, CA, in which the Court of Appeal held that a series of three letters sent between solicitors could constitute a course of conduct amounting to harassment for the purposes of the 1997 Act.

**Common law tort**

Harassment, as defined above, may also give rise to a tort at common law, although the legal basis for this in English law is somewhat uncertain (cf Khorasandjian v Bush [1993] QB 727, [1993] 3 All ER 669, CA; Hunter v Canary Wharf Ltd [1997] AC 655, [1997] 2 All ER 426, HL; Wong v Parkside Health NHS Trust [2003] EWCA Civ 1721, [2003] 3 All ER 932). The enactment of the Protection from Harassment Act 1997, however, has rendered the scope and nature of common law liability very much less important. In Scotland, the basis of common law liability may be less narrow: Ward v Scotrail Railways Ltd 1999 SC 255 (Lord Reed; OH).

**Breach of contract**

Within the employment context, conduct amounting to unlawful harassment may also entitle the victim to complain of a breach of contract on the part of the employer. This could be so, for example, where there is in force a policy or Code of Conduct, which prohibits harassment, and it can be shown that the employer has not acted in accordance with this. Such an analysis presupposes, of course, that the policy has contractual force.

Even if there is no such policy or Code of Conduct, or if whatever exists is non-contractual, the failure of an employer to react in an appropriate and responsible way to complaints of sexual harassment may well give rise to a breach of the implied duty to maintain trust and

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conflict. It is an implied term in a contract of employment that the employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have, (W A Goold (Pearmak Ltd) v McConnell [1998] IRLR 516, EAT) and complaints concerning such a serious matter as sexual harassment are clearly subject to this principle.

Harassment by third parties

From 1 October 2013 provisions in the Equality Act 2010 making employers liable for third party harassment are abolished from today, although there has been hardly any support for their repeal.

As part of its ‘red tape challenge’ to remove unnecessary regulation, the government launched a consultation back in 2012, proposing to remove the third party harassment provisions on the grounds that they had been introduced without any real or perceived need.

Repeal

The consultation, however, revealed that was hardly any support for repeal, with 71 per cent opposed to it. But the government pressed ahead, arguing that the provisions impose additional liabilities on employers, hindering business growth and economic recovery. So the Enterprise and Regulatory Reform Act 2013 abolishes the third party harassment provisions from 1 October 2013. But the reality is that the law can still protect employees who are abused by customers and suppliers, so the repeal may not have the benefits the government anticipates.

Under the third party harassment provisions, an employer’s liability for the harassment of its employees by third parties (such as customers or clients) only arose when harassment had occurred on at least two previous occasions, the employer was aware that it had taken place, and had not taken reasonable steps to prevent it happening again.

Three strikes

Diversity is a core value for most organisations and, in truth, there has always been some unease about the third party harassment provisions because they work on a ‘three strikes and you’re out’ basis – in other words, the employee had to have been harassed on three occasions (even though the employer may have tried to stop it) for the law to bite. Harassment is demeaning and degrading from any perspective, so having to endure it three times from a third party is not exactly supportive of a diverse culture.

However, the benefit of having a specific legal provision is that it brings home to employers that they may be liable for harassment by third parties over whom they have no control. It also allows employees to understand that there is legal protection in such circumstances. But all is not lost, as there are other legal avenues that can be pursued.

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Claims

From 1 October, in circumstances where an employer fails to prevent third party harassment, there are two potential claims which can be lodged under the Equality Act 2010:

• a direct discrimination claim, where the employer failed to act because of a protected characteristic, which results in less favourable treatment of the employee concerned when compared to how others were (or would have been) treated
• a harassment claim, on the basis that the employer's inaction amounts to unwanted conduct related to a protected characteristic that violates the employee’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Employees may also resign and claim constructive dismissal for breach of trust and confidence where they are subjected to third party harassment which the employer ignores. Alternatively, they may call in the police, claiming that a criminal offence has been committed under the Protection from Harassment Act 1997 (this is a course of conduct which the perpetrator knows, or ought to know, amounts to harassment).

Comment

Any form of harassment at work, whether from third parties or colleagues, is not acceptable and employers’ aim should be prevention, particularly given the risk of liability. So, even though the provisions have been abolished, employers should be ensuring that with regard to third party harassment:

• their anti-harassment policy expresses zero tolerance
• third parties are informed that harassment will not be tolerated, for example, by including it as a term in commercial contracts, displaying public notices, and so on
• managers are required to intervene if they observe harassment by third parties and employees are asked to report any such behaviour
• any complaint of harassment by a third party is promptly investigated and acted on.

STRESS AT WORK CASES

The “Hatton” Case

The Court of Appeal stated that where an employee is manifesting symptoms of psychiatric injury there must be good reason to attribute these symptoms to the employment itself rather than factors outside of employment. Absence from work by an

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employee because of a stress related illness is not necessarily proof of reasonable foreseeability particularly where the employee concerned has returned to work without complaint (paragraphs 29 and 30). Each case will turn on its own facts but a Claimant will have to establish that the facts relied upon by him to show reasonable foreseeability are plain enough to show that any reasonable employer in those circumstances could not reasonably have failed to have recognised the risk of injury (paragraph 31).

Mere knowledge by an employer of the Claimant’s symptoms is not enough by itself proof of a duty on the employer to act. The employer has a right to assess the facts before him and determine whether any and if so what action is required. The action must be shown to have been effective (paragraphs 32 and 33).

The nature and extent of work done by an employee will provide an indication of the risk of injury. It will be easier to conclude that harm is foreseeable if the employer is putting pressure upon the individual employee which is in all the circumstances of the case unreasonable (paragraph 26). What is unreasonable? The court provides some guidance of what may count as useful evidence in determining whether an injury is foreseeable. Where others, doing the same work, are under harmful levels of stress. There may be others who have already suffered injury to their health arising from their work (paragraph 26). There may be others who have suffered injury as a result of work or there may be abnormal levels of sickness and absence amongst others of the same grade or in the same department.

More important, are the signs that the employee himself exhibits (paragraph 27). However, it is important to distinguish between signs of stress and signs of impending harm to health. The court referred to the Walker case and noted that although Mr Walker complained and asked for extra help the judge held that his first breakdown was not foreseeable. Following his return to work foreseeability arose as he continued to do the same work, despite being told that he would receive additional support. If the employee or his doctor makes clear that unless something is done to help there is a clear risk of breakdown in health, then the employer will have to think what can be done about it (paragraph 27).

Even in the absence of such an express warning there may be reasonable foreseeability. Factors such as frequent or prolonged absences which are uncharacteristic of the employee are relevant. However, there must be good reason to think that the underlying cause is occupational stress rather than other factors. This could arise from the nature of the employee’s work or from complaints made about it by the employee from warnings given by the employee or others around him (paragraph 28).

Unless an employer knows of an employee’s particular vulnerability he is usually entitled to assume that the employee can cope with the normal pressures of the job. Generally an employer is entitled to take what he is told by or on behalf of the employee at face value (paragraph 29).

It is necessary to identify effective measures which, if taken, would be likely to have made a difference (paragraph 34). It may not be enough to show that there were other actions which could (and perhaps should) have been taken without more.

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Young v Post Office [2002] IRLR 660

The Court of Appeal held that a County Court judge had not erred in holding that the employers were in breach of their duty of care in failing to ensure that arrangements made for the claimant’s return to work after an absence of four months due to a nervous breakdown brought on by stress at work were adhered to, with the result that within 7 weeks of returning to work, the Claimant again found himself under stress and suffered a recurrence of his psychiatric illness.

Where an employee has already suffered from psychiatric illness resulting from occupational stress, it is plainly foreseeable that there might be a recurrence if appropriate steps are not taken when an employee returns to work. The employer owes a duty to take such steps and to see that the arrangements made are carried through.

In Pratley v Surrey County Council [2003] IRLR 794, CA the Claimant worked as a care manager from 1994. The position involved considerable pressure because of the demands on the services of care managers and a lack of funding. The employers knew that such pressures existed and could lead to stress, and that undue pressure or stress created a risk of injury to health.

Up until August 1996, however, Miss Pratley had given no indication that she felt particularly pressurised. In fact, she had deliberately withheld information about the pressures she was under and their effect on her. She regularly worked long hours of overtime which she did not record and for which she did not claim time off in lieu as her contact of employment provided. When she had two weeks’ sick leave in March 1996, for reasons recorded in her doctor’s certificate as “neuralgia”, her doctor had suggested that her headaches were probably due to stress but she asked him not to record that in her certificate. She never sought to make use of the occupational health service or the counselling services which were available to the council’s employees.

On 21 August, a week before she was due to go on holiday, Miss Pratley had a meeting with her manager at which she expressed concern that a large number of additional cases were going to be allocated to her. She said that she felt that she was “going under” and that she feared repercussions on her health as a result of pressures. The manager agreed to introduce a system of “stacking” cases, whereby new cases would not be allocated to individual case managers until their existing workload had space. The manager did not take immediate steps to implement that system, deciding rather to wait to see how things were and how Miss Pratley felt when she returned from holiday before taking specific action. However, two days after returning to work and finding that nothing had been done to introduce the stacking system, Miss Pratley had a nervous breakdown and ceased working. She was eventually dismissed in May 1998.

Miss Pratley claimed damages from her employers on the grounds that the injury to her health had been caused by the employers’ negligence in failing to keep their promise to lighten her workload by introducing the stacking system. Her claim was dismissed. The judge found that whilst it could reasonably have been foreseen that Miss Pratley would have a breakdown at some future stage if her workload was not reduced, it was not reasonably foreseeable that she would suffer an immediate collapse if the stacking system which she had seen as a solution to her overwork was not introduced. The judge concluded, therefore, that although the fact that the stacking system had not been
introduced was a material cause of Miss Pratley’s depressive illness, the employers were not in breach of their duty of care.

The Court of Appeal held that the High Court judge had not erred in holding that the employers were not in breach of their duty of care to the claimant in respect of a depressive illness which she suffered when, on returning to work from holiday, she discovered that the employers had taken no steps to fulfil their promise to introduce a system which would lighten her workload. The judge was entitled to conclude that although the failure to introduce the system was a material cause of the claimant’s depressive illness, the employers could not reasonably have foreseen that she would suffer an immediate collapse if the system which she had seen as a solution to her overwork was not introduced.

There is a distinction between a risk of psychiatric injury arising through continuing work overload in the future and a risk of collapse in the short term arising from disappointment of a “cherished idea” developed as a result of a conversation between the employer and the employee about possible problems if there was continuing work overload over a future period. The harm in each case is psychiatric injury but it occurs not only by different mechanisms but, more importantly, at quite different times in circumstances calling for a response at different times.

In the present case, what was foreseen was a future risk if work overload continued. The immediate collapse which occurred was unforeseen and unforeseeable. The fact that the employers undertook to implement a system to alleviate the problem and that they recognised that it would not have been unreasonable for the claimant to expect the system to be implemented on her return from holiday did not mean that it was foreseeable that any injury of any kind would arise if that was not done. The judge was entitled to find that it was entirely reasonable for the employers to see how things were and how the claimant felt on her return to work before taking specific action. It may be unfortunate and regrettable if statements made or expectations created about what an employer will do are not implemented or realised, but they are not the touchstone of foreseeability of relevant injury, or of negligence.

It could not be accepted that once the risk of future injury was foreseen, the employers ought reasonably to have taken steps to eliminate or reduce that risk by introducing the new system by the time the claimant returned from holiday, and that since the failure to do so was in fact causative of the claimant’s actual collapse, the employers were liable in negligence. That argument assumed that foreseeability of injury to mental health, in whatever form and howsoever to be caused, must necessarily found liability for any injury to mental health that in fact occurs. It was wrong to suggest that liability in negligence for injury of one type can flow from unreasonable failure to prevent injury of another type.

**Bonser v RJB Mining (UK) Ltd [2004] IRLR 164, CA**

In this case the Claimant was employed by RJB Mining as the technical support and training manager from January 1995. The job was a demanding one and she regularly worked long hours. Unknown to her employers, she had a pre-existing emotional vulnerability. In her previous employment, she was off work for five months with depression brought on by a perceived deception by a fellow employee in relation to a property purchase. She also had severe premenstrual stress which required significant

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hormone replacement therapy. In addition, her husband had had to give up work because of his emotional vulnerability and that placed added pressure upon her.

Throughout the autumn of 1996, Mrs Bonser’s pre-existing condition was aggravated and by February 1997, she was clinically ill with a depressive disorder. In April, she had a nervous breakdown and was unable to continue working. She was dismissed in May 1998.

Mrs Bonser subsequently made a claim against her employers for damages for psychiatric injury caused by stress at work. She alleged that she had been subjected to an ever increasing workload by an overbearing superior, who ignored the increasing stress levels to which she was subjected.

On the basis of the medical evidence, the judge concluded that in spring 1997 when it became clear that Mrs Bonser was suffering from anxiety and stress, it was too late to take any steps to remedy the situation. However, the judge went on to find that the origin of Mrs Bonser’s difficulties could be traced back to August 1996. The judge found that following a meeting between Mrs Bonser’s line manager and his superior, added pressures were put on the six employees who formed the support and training team to achieve agreed deadlines. According to the judge, the demands placed upon the employees were excessive and it should have been apparent that some members of the team, and Mrs Bonser in particular, would not be able to cope. The judge also had regard to an incident which occurred a week before Mrs Bonser was due to take a week’s holiday, when she was told that she had to complete a project which would entail a further 40 hours of work. She subsequently broke down in tears in front of her line manager, saying how exhausted she was and how she felt her holiday was under threat.

The judge found that the employers were in breach of their duty of care in failing to recognise in August 1996 that if they did not do something to alleviate the pressures upon Mrs Bonser, she would “crack”. Had they done so, her breakdown would not have been avoided but its onset would have been delayed by about a year. On that basis, the judge awarded damages of just over £38,000.

The Court of Appeal held the High Court judge had erred in holding that the employers should reasonably have foreseen that if they did not take steps to reduce the claimant’s workload, she would “crack up” and in therefore awarding damages to the claimant on the basis that their failure to do so aggravated a pre-existing psychiatric condition causing her to suffer a nervous breakdown some 12 months earlier than would otherwise have been the case.

In order to succeed in a claim for damages for psychiatric illness caused by stress at work, a claimant must meet the high threshold set in Sutherland v Hatton and establish not simply that it was reasonably foreseeable that overwork would lead to stress but that it would lead to a breakdown in the stressed employee’s health.

In the present case, there was no basis upon which the judge could properly have reached the conclusion that the risk that the claimant would suffer a breakdown should have been apparent to her employers. The claimant did not manifest by her conduct or complaint anything which sufficiently put her employers on notice that she was vulnerable to imminent risk of injury to her health. The only visible sign was of her being tearful on a single occasion some months before her eventual breakdown. That event did not sufficiently foretell the breakdown that was to occur. To the knowledge of her employers she may have become vulnerable to the stress of overwork but not of psychiatric

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breakdown. Had the claimant not in fact been particularly vulnerable to stress-induced health breakdown, there was no reason to think that she would have succumbed to suffering it. The employers knew nothing of that vulnerability and therefore were not liable for the breakdown when it occurred.

**Barber v Somerset County Council [2004] IRLR 475**

Here the Claimant was appointed head of mathematics at East Bridgwater Community School in 1984. The school was then already facing serious problems which became worse. It suffered a massive drop in intake and resources fell accordingly. In 1995, there was a restructuring of staffing at the school.

In common with other heads of department, Mr Barber’s position was reduced to that of “area of experience coordinator” in maths and his salary was reduced accordingly. The two former deputy heads of his department were required to take on new and demanding pastoral duties. Mr Barber found that he was effectively doing the same work for less money and with less support. In order to maintain his former salary level, he took on another area of responsibility as project manager in charge of publicity and media relations. As a result, Mr Barber was working very long hours. He had a full teaching timetable and together with his new media job he was working between 61 and 70 hours a week.

Towards the end of 1995, Mr Barber was beginning to feel the strain. In May 1996, he was signed off work by his doctor because of stress and depression brought about by his workload. Until then, he had never considered himself as a candidate for psychiatric illness. During his three-week absence, he sent in his sick certificates which stated that he was suffering from overstress and depression. On his return to work, Mr Barber filled in a sickness declaration form stating his illness as “overstressed/depression”, which was counter-signed by one of the deputy heads. However, no one approached him to discuss his illness or what could be done to ease his burden at work.

Mr Barber decided to take the initiative and arranged a meeting with the head teacher at which he told her that he was finding things difficult. The head treated him unsympathetically, telling him that all the staff were under stress. A few weeks later, he told one of the deputy heads that he could not cope and that the situation was becoming detrimental to his health. Again, this provoked an unsympathetic response and no steps were taken to investigate or remedy the situation. He was referred to the other deputy head who, while more sympathetic in his approach, did nothing beyond urging Mr Barber to prioritise his work.

On returning to work after the summer holidays, Mr Barber found that, if anything, his workload was slighter heavier. He went to see his doctor on 19 September but was not advised to stay away from work. On 25 October, he wrote a long letter to his doctor describing his problems and symptoms in detail and asking that he be referred for counselling. The doctor responded promptly and asked Mr Barber to go and see him. However, before an appointment could be arranged, a crisis occurred at the school. Mr Barber lost control of himself and started shaking a pupil. He left school that day and never returned to his teaching post. He accepted ill health retirement in March 1997 when he
was 52 years old. Two psychiatrists who subsequently examined him agreed that he was suffering from moderate or severe depression.

Mr Barber claimed that his psychiatric illness had been caused by stress at work and made a claim against his former employers for damages. Judge Roach, sitting at Exeter County Court, found that Mr Barber’s meeting with the headmistress in June 1996 after his three-week absence due to depression represented a clear warning to the school’s senior management that he needed help to carry out his duties. Mr Barber had told her that he was having difficulty coping and that his health was declining. According to the judge, it must have been apparent, given his time off work for stress in May 1996, that the risk of injury to Mr Barber’s mental health was significant and higher than that which would have related to a teacher in a similar position with a heavy workload.

In the judge’s view, a prudent employer, faced with the knowledge of a work overload dating back to the autumn of 1995 and increasing in 1996 to the extent that the employee had to take time off work, would have investigated the employee’s situation to see how his difficulties might be alleviated. The failure to investigate or provide at the least temporary assistance led to Mr Barber’s attempting to cope and inevitably failing to do so. The judge concluded that Mr Barber’s depressive illness was caused by stress at work. He allowed Mr Barber’s claim and awarded damages of just over £100,000.

The County Council’s appeal against that decision was heard by the Court of Appeal as one of four conjoined appeals by employers against findings of liability for an employee’s psychiatric illness caused by stress at work – Sutherland v Hatton, Somerset County Council v Barber, Sandwell Metropolitan Borough Council v Jones and Baker Refractories Ltd v Bishop [2002] IRLR 263. The Court of Appeal allowed the appeals in three of the four cases, including the present case.

Giving the judgment of the court, Lady Justice Hale formulated a number of guidelines for determining employer liability for psychiatric illness caused by workplace stress. The court held that to trigger the duty on an employer to take steps to safeguard an employee from impending harm to health arising from stress at work, the indications must be plain enough for any reasonable employer to realise that he should do something about it. The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable. This will depend upon the nature and extent of the work done by the employee and whether there are signs of impending harm from the employee himself.

However, according to the Court of Appeal, unless the employer knows of some particular problem or vulnerability, an employer is usually entitled to assume that the employee can withstand the normal pressures of the job and he is generally entitled to take what he is told by or on behalf of the employee at face value. An employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he was doing before. The employer is usually entitled to take that at its face value unless he has good reason to think to the contrary.

In the present case, the Court of Appeal concluded that the County Council had not been in breach of its duty as an employer. Although there was evidence entitling the judge to hold that stress at work had made a material contribution to the employee’s illness, that in itself was not enough to lead to the conclusion that the employers were in breach of duty.

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or that their breach caused the harm. The judge should have considered at what point the employer’s duty to take some action was triggered, what that action should have been, and whether it would have done some good.

Mr Barber appealed against that decision. There was no further appeal in any of the other three cases.

The House of Lords held that the Court of Appeal had erred in allowing the employers’ appeal against the finding of the judge in the County Court that the employers were liable for the claimant teacher’s psychiatric illness brought about by the stresses and pressures of his workload.

In determining whether an employer was in breach of the duty of care owed to an employee in respect of psychiatric illness caused by work-related stress, the best statement of general principle remains that of Swanwick J in *Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Ltd* “... the overall test is still 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”. The practical guidance given by the Court of Appeal in *Sutherland v Hatton* is a valuable contribution to the development of the law but should not be read as having anything like statutory force. Every case will depend upon its own facts.

Although the present case was close to the borderline, the judge was entitled to form the view that the employers were in breach of duty and there was insufficient reason for the Court of Appeal to set aside his finding. The employers’ duty to take some action arose when the claimant returned to work after a three-week absence due to stress and depression and saw separately each member of the school’s senior management team. It continued so long as nothing was done to help him. At the very least, the senior management team should have taken the initiative in making sympathetic inquiries about the claimant when he returned to work, and in making some reduction in his workload to ease his return. Even a small reduction in his duties, coupled with the feeling that senior management was on his side, might by itself have made a real difference. In any event, his condition should have been monitored and, if it did not improve, some more drastic action would have to have been taken, such as taking on a supply teacher to temporarily relieve him of some of his duties. Supply teachers cost money but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff.

*Hone v Six Continents Retail Ltd [2006] IRLR 49*

The Court of Appeal has upheld a finding that it was reasonably foreseeable that a pub manager would suffer psychiatric injury if he continued to work long hours without adequate support. *Hone v Six Continents Retail Ltd [2006] IRLR 49* applies the test formulated by Lady Justice Hale in *Sutherland v Hatton*, and in particular focuses on her seventh proposition: “To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.” This is said to be “a clear and workable test to apply”.

One of the interesting aspects of this case is the role played by the Working Time Regulations. The central issue on appeal was whether there was evidence to justify a

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finding that injury to the employee’s health was reasonably foreseeable, given that, unlike most successful stress at work claims, he had no prior history of mental illness and he had not complained that his health was being affected. He had, however, refused to sign an opt-out from the 48-hour limit, and had persistently complained about his working hours and lack of adequate support, asserting that he was regularly working 90 hours per week.

Giving the leading judgment, Lord Justice Dyson says: “the fact that Mr Hone was making such claims indicated either that he was working hours greatly in excess of anything that could reasonably have been expected of him, week in week out, or that he was making irrational entries and in effect making a cry for help ... All of those matters, taken in conjunction with the fact that, as was known by the defendants, the Working Time Regulations impose a requirement of no more than 48 hours per week without consent, were sufficient to justify the conclusion” that harm to the employee’s health was reasonably foreseeable. Of course, most employees who exceed the 48-hour limit do not work 90 hours per week, but this decision at least establishes that an employer’s knowledge that working time rules are being broken is relevant evidence in a stress at work case as to whether risk of injury was foreseeable. “The plain and obvious purpose of the Regulations”, Lord Justice Dyson points out, “is to protect the welfare and health of employees.

**The facts:**

Mark Hone was employed by the defendants as a licensed house manager from 1995. He had a good employment record and in 1998 had been named “pub manager of the year”. In August 1999, he took over the management of a public house in Luton. Early on in that employment, he asked for a assistant manager but none was appointed. Mr Hone complained that he did not have adequate support and had to work long hours. He made returns showing that he was regularly working 90 hours a week. Mr Hone derived no financial benefit from making such claims. The employers did not accept that he was working such long hours and did not take his claims of overwork seriously. Because of his concern about the hours he was working, Mr Hone refused to sign an opt out under the Working Time Regulations.

On 19 April 2000, Mr Hone had a meeting with the operations manager at which he mentioned that he was working excessively long hours and was tired. As a result of that meeting, the operations manager accepted that an assistant manager should be appointed. However, apart from some occasional relief, no help was provided.

On 15 May, Mr Hone went to his GP complaining of headaches and insomnia and was referred to a consultant neurologist. On 28 May, he collapsed at work following giddiness and chest pain and never returned to work for the defendants. He subsequently claimed damages for psychiatric injury on the basis that his psychiatric injury was caused by stress at work, which in turn was attributable to his being required to work excessive hours without adequate support.

The county court judge allowed the claim and awarded damages of £21,840. The judge found that after the meeting in April 2000, an injury to Mr Hone’s health attributable to stress at work was reasonably foreseeable. The judge also held that, since they had not obtained his written agreement to opt out of the Working Time Regulations, the employers were under a duty to take all reasonable steps to ensure that he did not work for more than
48 hours a week. According to the judge, it was well within the considerable resources available to the employers to have provided an assistant manager so that Mr Hone could have two days off a week. Instead, they had stood idly by until Mr Hone collapsed.

The employers appealed against the judge’s finding that, from 19 April 2000, an injury to Mr Hone’s health was reasonably foreseeable. In their submissions, the employers emphasised that Mr Hone had no prior history of mental illness or of suffering adversely from stress at work, and he had not complained that his health was being affected by his work. Nor was there any evidence that, in general, licensed house managers were prone to such complaints.

Court of Appeal judgment:

The county court judge had not erred in holding that it was reasonably foreseeable that the claimant licensed house manager would suffer psychiatric injury if he continued to work long hours without adequate support and that, in failing to provide that support, the employers were liable for the injury which the claimant sustained as a result of stress at work.

In determining whether psychiatric injury to an employee was reasonably foreseeable, the correct test is that enunciated by Lady Justice Hale as her seventh proposition in Sutherland v Hatton, namely that: “To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.” This is a clear and workable test to apply.

In the present case, the judge had directed himself correctly on the basis of that test and had correctly applied it to the facts that he found. The judge was entitled to conclude that the fact that the employee had been asking for an assistant manager from early on in the employment, that he had complained about excessive hours and that he was very tired, and that he had put in returns showing that he was working 90 hours a week on a seven-day week basis, were sufficiently plain indications of impending harm for a reasonable employer to realise that they should do something about it. The employee’s claim to be working 90 hours a week, which was not made for any financial benefit and was dismissed by the employers as “nonsense”, indicated either that he was working hours greatly in excess of anything that could reasonably have been expected of him, or that he was making irrational claims and, in effect, making a cry for help. All those matters, taken in conjunction with the fact that, as the employers knew, the Working Time Regulations impose a requirement of no more than 48 hours per week without consent, which the claimant had refused to give, were sufficient to justify the judge’s conclusion.

Sayers v Cambridgeshire County Council [2007] IRLR 29

In this case a claim was brought by a former team manager in a social services department. She left work owing to depression, which was diagnosed as a psychiatric illness related to workplace stress.

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Mr Justice Ramsey, in the High Court, holds that it was not reasonably foreseeable that the claimant would suffer psychiatric injury if nothing was done to alleviate the workplace stress to which she was subjected. The fact that two of the claimant's work colleagues were aware that she was taking anti-depressants could not be equated with knowledge by the employers, where this was not reported to more senior personnel.

The judge accepted that “the knowledge of an individual which is not communicated to the higher management but is treated as information held confidentially by that employee cannot be knowledge, actual or imputed, of the council for the purpose of determining whether the indications are plain enough for the council, as a reasonable employer, to realise that it should do something about it.” Much of the claim was based on the fact that Mrs Sayers generally worked between 50 to 60 hours a week. This was in breach of the 48-hour maximum working week laid down by the Working Time Regulations.

Although it was clear that the claimant was “overworked”, that did not make her illness reasonably foreseeable. The excess hours were of a different dimension that in 

in Hone v Six Continents Retail, where the employee regularly worked in excess of 90 hours per week.

The judge also rejects a contention that breach of the obligation under the Working Time Regulations to take all reasonable steps to ensure that the 48-hour limit is complied with gives rise to a common law cause of action for breach of statutory duty. The judge holds that given that the Regulations provide that breach of the hours limit is an offence, Parliament could not have intended there also to be a civil cause of action to claim damages for breach of statutory duty. Nor, according to this case, were there any directly enforceable rights under the European Framework Directive on Health and Safety. For all the publicity that controversy over the UK’s “opt out” has received, this case highlights the lacunae in effective enforcement of the weekly hours limit. The availability of criminal prosecution is held to oust any civil remedy yet, so far as is known, there have been no prosecutions of employers for breaches of the 48-hour maximum working week.

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Green v DB Group Services (UK) Ltd [2006] IRLR 764

In this case the claimant was employed as a company secretary assistant. Shortly after starting work, she began a relationship with her head of department. Her claim, however, was not in respect of any abuse of power by a more senior manager. Instead, it was based on a “relentless campaign of mean and spiteful behaviour” by four women who worked in close proximity to her, and in respect of behaviour by a male co-worker which is found to be “domineering, disrespectful, dismissive, confrontatory, and designed to undermine and belittle her in the view of others.” The key principle relied upon by Mr Justice Owen in upholding the claim is that the focus of attention is not on each individual incident. Here, the incidents in question “when viewed individually are not of major significance. It is their cumulative effect that is of importance.” In that context, the bank is found to be vicariously liable for both cases of bullying.

Although the group of women did not work with the claimant, there was a close connection between their employment and the behaviour, such that it was just and reasonable to hold the employers liable. The employees’ behaviour also amounted to harassment within the meaning of the Protection from Harassment Act. By failing to take adequate steps to protect Ms Green from her fellow employees’ bullying behaviour, the bank was in breach of their duty of care to her. Management knew or ought to have known what was going on. Bullying was a long-standing problem in the department and was raised by Ms Green at Nationwide Employment Lawyers enquiry@natemlaw.co.uk 08445 715 169
her first appraisal. A “reasonable and responsible employer” would have intervened as soon as they became aware of the problem. Instead, “the managers collectively closed their eyes to what was going on, no doubt in the hope that the problem would go away”, and the bank's HR department is found to be guilty of “a culpable want of care”. The award of damages included £639,000 in respect of future losses. The bank was also ordered to pay Ms Green's legal costs, including an immediate payment on account of £350,000.

**R (Montgomery) v Hertfordshire County Council [2006] IRLR 787**

Employers have a duty to protect their staff from possible bullying and harassment. If they are public authorities, however, the counterpoint to this duty is an obligation to **act fairly** in respect of those against whom action is to be taken. This is emphasised by Nicholas Blake QC, sitting in the Administrative Court. This is an unusual case in which the local authority banned the claimant, a former employee, from their premises or from contacting their staff in connection with her new employment. This action was based on complaints about her behaviour by staff at the time she was employed by the council. Quashing the local authority's decision, the judge holds that acting fairly in this context means “giving the person against whom the action contemplated is to be taken an effective opportunity, before the action is taken, to make representations upon the reasons for the action, the extent of the action, the impact upon him or her of the action, and taking those considerations into account before the council commit themselves to a decision which may well be difficult to review thereafter.” In this case, the local authority gave no notice of their action, did not explain the grounds of their action, did not explain the basis of future fears based upon the past complaints, and did not give the claimant any opportunity before the decision was taken to respond to any such matters with effective representations. Although emphasising that the defendants were not “powerless to prevent abuse or threats or damage to health or other matters of legitimate concern in respect of their staff by someone who continues to behave in an irresponsible or inappropriate way”, the judge concludes that the local authority failed manifestly and flagrantly to comply with the fundamental principles of fairness.”

**Intel Corporation (UK) Limited v Daw [2007] EWCA Civ 70**

7th February 2007

An employer was held to be liable for the chronic depression suffered by one of its employees (The Employee) as a result of work-related stress. The Court of Appeal held that it is not a rule of law that an employee, who does not resign when stresses at work are becoming excessive, necessarily loses a right of action against their employer. It was also held that the mere provision of counselling services by an employer did not discharge their duties of care. Whether it will assist an employer will depend upon the circumstances of each case.
The Facts
The Employee was employed by Intel Corporation UK Limited (Intel). She suffered a breakdown in June 2001, further to which she suffered from chronic depression and could not work. She brought a claim for personal injury against Intel in the High Court. The Employee alleged that the stress leading to her breakdown had resulted from confused reporting lines and priorities, competing demands made on her by different managers and the provision of insufficient assistance.

The Employee also suggested that her history of postnatal depression, of which her managers were aware, was relevant in that it made her more vulnerable to a breakdown and should therefore have been taken into account. The Employee submitted that, by the end of December 2000 or the beginning of January 2001, Intel ought reasonably to have foreseen that there was a real risk of her suffering a breakdown and should have responded to improve her situation. Following the principles set down in Sutherland v Hatton [2004] UKHL 13, the High Court found that workplace stress precipitated the Employee’s breakdown.

Intel appealed against the High Court's decision. It suggested that, for the sake of consistency, there should be close adherence to the principles in Sutherland v Hatton and that it was ultimately a choice for the Employee whether to remain in or leave Intel's employment. It made two main submissions, firstly that the company should not have been expected to predict that the breakdown would occur so quickly and secondly that Intel's provision of a counselling service and medical assistance was a sufficient discharge of its duty of care. Intel could reasonably expect an employee feeling the onset of symptoms of psychiatric illness as a result of work related stress to use that service. If the Employee had done so the seriousness and urgency of the situation would have become clear. Intel's human resources department could have brought home to Intel's management what they should do.

Held
The Court of Appeal held that the fact that Mrs Daw did not give up her job when the stresses grew did not eliminate the duty of care owed to her. It is not a rule of law that an employee who does not resign when stresses at work are becoming excessive necessarily loses a right of action against their employer. The breakdown was reasonably foreseeable.

The Court of Appeal also held that, whilst there may be cases where an employee may be expected to use counselling services, Mrs Daw's problems could, as the High Court held, only be dealt with by management reducing her workload.

The Court of Appeal concluded that the reference to counselling services in Sutherland v Hatton “does not make such services a panacea by which employers can discharge their duty of care in all cases.”

Dickens v O2 plc [2009] IRLR 58

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Hatton guidelines cannot be taken out of context. The Hatton hurdles may be easier to surmount than thought hitherto. Dickins shows that employers who fail to take prompt remedial action when an employee says that they are “at the end of their tether” may well be found to be in breach of duty.

The facts:

The claimant worked for the defendant, O₂ Plc, for a number of years. When she suffered a breakdown in her health, she brought county court proceedings against the defendant, seeking damages for psychiatric injury caused by excessive stress in the course of her employment during 2001 and 2002. She claimed that the defendant had been negligent in failing to act on her complaints of stress.

In April 2002, she had expressly warned her line manager that she was not coping with some aspects of her job and that she was “at the end of her tether”. However, she alleged that, in breach of duty, the defendant had failed to relieve her situation so that she had carried on working. She had been told to use the defendant's internal counselling service. She had repeated her concerns at her annual appraisal in May. A few days later, she had felt unable to come to work. She never returned to work and her employment was terminated in November 2003.

The judge purported to rely on the Court of Appeal decision in Sutherland and the House of Lords decision in Barber. He considered the claimant's personality, which it was common ground rendered her psychologically vulnerable. The psychiatric evidence was to the effect that the perceived work problems, in combination with the prior psychological vulnerability had resulted in the deterioration in the claimant's mental health. He held that after the claimant's conversation with her line manager in April 2002, action should have been taken by the defendant much sooner that it was. As to causation, he considered that there were other factors, in addition to the breach of duty which had caused the injury. He held that the claimant had, at the very least, been deprived of the chance of a swift recovery from her psychiatric illness, or the chance of not “plummeting to the depths” to which she had subsequently fallen. In view of the other causal factors involved, the court considered that it was appropriate that the damages be apportioned. He awarded the claimant 50% of the total damages.

The Court of Appeal held:

The judge had been entitled to reach his conclusions on reasonable foreseeability, breach of duty and causation.

(1) According to Hatton, it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health. In the view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress, and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it.
In the present case, the evidence had been quite strong enough for the judge to conclude that the employer had received a clear indication of impending illness.

(2) Hatton makes plain that the advantage of a confidential internal counselling service is that many employees are unwilling to admit to their line managers that they were not coping with their work for fear of damaging their reputations. A confidential service would enable the employee to take advice without making any potentially damaging disclosures direct to the employer.

In the present case, the claimant had not been afraid to tell her line manager that she was “at the end of her tether”. Given the situation where the claimant was describing severe symptoms, alleging that they were due to stress at work and was warning that she did not know for how long she could carry on, a mere suggestion that she seek counselling could not be regarded as an adequate response.

(3) The test of causation, according to Hatton, is whether the breach has made a material contribution to the claimant's ill-health.

In the present case, it appeared that the judge had not applied the correct test. Instead of asking whether the breach had made a material contribution to the onset of illness, he had spoken of the claimant losing the chance of a swift recovery and the chance of not plummeting to the depths of her subsequent illness. In doing so, he had entered unnecessarily into the difficult area of damages for “loss of a chance”. It was not a “loss of a chance” case but a case where more than one factor had causative potency in the development of the illness.

However, it was clear from the judge's findings and the psychiatric evidence that the identified breach had made a material contribution to the claimant's severe illness. Such a finding was inevitable.

Accordingly, the appeal failed.

Observed (per Lady Justice Smith):

In a case which has had to be decided on the basis that the tort has made a material contribution but it is not scientifically possible to say how much that contribution is (apart from the assessment that it was more than de minimis) and where the injury to which that has lead is indivisible, it will be inappropriate simply to apportion the damages across the board. It may well be appropriate to bear in mind that the claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a reduction in some heads of damage for future risks of non-tortious loss. But there should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play.

Connor v Surrey County Council [2010] IRLR 521

The Facts

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Erica Connor was employed by Surrey County Council as the head teacher of a primary school. Most of the pupils were Muslim (84%), and approximately 64% were Pakistani Muslims. It was a “maintained school”, and there was detailed legislation concerning the governing body of such a school. Under ss.14 and 16A of the School Standards and Framework Act 1998, the council had the power to replace the governing body of the school with an interim executive board, after taking certain procedural steps, such as giving notice and consulting with the existing governing board.

In February 2003, new governors joined the governing body, and they began arguing that the school should be more closely linked to the Muslim community and the mosque. Tensions arose at meetings in December 2003 and February 2004. There were demands for information, and aggressive questioning of Ms Connor. There were allegations of race discrimination and “Islamophobia” against Ms Connor and the school. For her part, Ms Connor complained of intimidation and aggression at meetings of the governing body, which placed considerable stress on her and affected the staff. She believed that there was an agenda to turn the school into an Islamic faith school.

The council held a review, which exonerated Ms Connor and the school of the allegations, and raised questions about the governance of the school. Mr Martin, one of the governors wanting closer links between the school and the Muslim community, complained that the review was deeply flawed, and made various complaints against Ms Connor, amongst others. The council's response in 2004 was to arrange mediation between, in particular, Ms Connor and Mr Martin. In 2005, the mediation took place, and Mr Martin agreed to withdraw his allegations.

However, the parties to the mediation had no power to bind the governing body as to any matter within the latter's responsibility, and by a narrow majority the governing body voted to relieve Mr Martin of his governorship. In response, in June 2005 Mr Martin complained of institutional racism within the school, and a petition of no confidence in Ms Connor was circulated. It described Ms Connor as racist and “Islamophobic”. It stated that “Erica believes that Pakistanis are less intelligent because Islam allows cousins to marry” and that “she ... has an active campaign to distance the children from Islam”. It claimed that “she refuses to discuss or permit better links with the mosque or the community ...” It complained that “Erica's prime motivation is her own career, she has no respect for the needs of the community. She is contemptuous of the parents and has as little to do with them as possible. Erica dresses in a way that is inappropriate to our community's values.”

The council's response was to state that there was no evidence that the statements were factually correct, and that a number of them were defamatory. It stated that the police had been contacted, and it was also taking legal advice. It referred to the earlier review which had found no evidence of racism or “Islamophobia”. It subsequently commissioned an independent investigation of the formal complaint of Mr Martin, which found that there was insufficient evidence to uphold the complaint of racism, but upheld the complaint that the school had not been responsive to the needs of the faith community. It held that Ms Connor and some of the other governors had indirectly displayed “Islamophobia”, but that any cultural and religious insensitivities were more a result of lack of knowledge and understanding than hatred towards Muslims or Islam.

Ms Connor went on sick leave, suffering from stress and depression. After psychiatric assessment, she was diagnosed with clinical depression. She brought proceedings against the council, seeking damages for psychiatric injury. Subsequently, in October

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2005 an interim executive board was established in place of the governing body, and it held its first meeting in November. Ms Connor retired in December.

The deputy judge upheld Ms Connor’s complaint. He found that the council had been negligent in two respects: (i) its failure in commencing procedures to establish an interim executive board by February 2005; and (ii) its decision to establish an independent inquiry into the allegations of racism and Islamophobia. He found that the claims of Mr Martin and his associates were generally given weight by the council, while the anxieties of the demoralised Ms Connor were generally sidelined. He held that from late 2003 to the summer of 2005, the governing body was dysfunctional due to the conduct of Mr Martin and his faction. They had sought to monopolise meetings with a view to imposing their own agenda, and were prepared to do so regardless of the interests of the school and anyone who resisted them. The deputy judge found that their agenda was at the very least to introduce an increasing role for the Muslim religion in the school. He concluded that it was not unreasonable for Ms Connor and the staff to believe that there was an agenda to convert the school into an Islamic faith school.

The council appealed. Amongst other things, it argued that the delay in establishing an interim executive board and the decision to set up an inquiry into Mr Martin's complaint lay wholly in the field of its public law functions, and as such were not justiciable as particulars of negligence in a private law action for damages for personal injuries.

The Court of Appeal

The deputy judge had not erred in law in finding the council liable in negligence for Ms Connor’s personal injury.

The law will in an appropriate case require a public authority to fulfil its pre-existing private law duty by the exercise of a public law discretion, but only if that may be done consistently with the authority’s full performance of its public law obligations. The demands of a private law duty of care cannot justify, far less require, action (or inaction) by a public authority which would be unlawful in public law terms. The standard tests of legality, rationality and fairness must be met as they apply to the use of the public law power in the particular case. If the case is one where the action’s severity has to be measured against its effectiveness, it must also be proportionate to whatever is the statutory purpose. There should be no inconsistency between the private law aim and the public law purpose. In exercising the public law discretion in fulfilment of the duty of care, the public authority should in no way diminish or undercut its service of the public purpose.

In the present case, the council would have been justified in commencing procedures to establish an interim executive board in place of the board of governors in February 2005, on the basis of a serious breakdown in the way the school was managed or governed which was prejudicing, or likely to prejudice, the standards of performance of pupils at the school. The council’s duty to correct that position, and their duty of care to Ms Connor, plainly marched together. Accordingly, the council was liable for negligence.

Rayment v Ministry of Defence [2010] IRLR 768

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The facts:

The claimant, Donna Rayment, was employed by the Ministry of Defence at the Honourable Artillery Company. Initially, she was a civilian employee, but subsequently she became the staff car driver for the commanding officer of the regiment, which was a post for a non-regular permanent soldier. In addition, she was expected to work in the stores with the military transport quartermaster's department. She was entitled to take time off in lieu for late hours worked. The claimant had an extensive past psychiatric history of depression, and a considerable pre-existing vulnerability to developing a psychiatric disorder. She made no disclosure to the regiment in advance of her employment of her history of depression, despite being asked to disclose such information in a medical questionnaire. She was also a single parent to a profoundly deaf daughter.

The claimant's timekeeping and attendance was of concern to her superiors, as were her relations with colleagues. She would take time off in lieu without informing her line manager of the time she intended to arrive at work, causing difficulties for other employees. For her part, the claimant complained that the combination of stores and driving duties led to excessive hours. She also complained about the presence of pornographic photos, of women in sexually explicit poses, on the wall of the military transport restroom. She was the only female full-time driver to use the room. She had removed the photos but they had been replaced on the wall. She had complained about that, but when she had returned to the room a few months later, the photos were still on the wall. On 5 April 2004, the claimant felt unwell whilst driving to work, and was unable to continue. She went on sick leave, and was unable to drive for six months, although she returned to work on 17 May 2004, when she was called to a meeting with Major McCaffrey and Major Papenhus, two of the senior officers in the regiment. She was told that there had been an administrative mistake: she had not been employed as a non-regular permanent soldier but as a Territorial Army volunteer. In short, she had no job, and had to repay a month's salary of about £1,300. However, the Army Welfare Service took up her case, and she was reinstated on 27 May 2004. She brought a formal "redress of complaint" to the commanding officer, which was dismissed.

In January 2005, the claimant went on sick leave, diagnosed with anxiety and stress, and certified as not fit for normal duties. In February 2005, she was given a final written warning, to last for three months. The warning was on the ground of her alleged “poor suitability” for the contracted role. It referred to her “disruptive influence” within the regiment, her “apparent predilection to seek reprisal for any apparent wrongdoing”, and her continued absence. The claimant brought another redress of complaint, directed at the handling of her previous complaint. The second complaint was also dismissed. The warning expired on 21 May 2005, when the claimant was still on certified sick leave. She was discharged from her role.

The claimant brought proceedings under the Protection from Harassment Act 1997. The alleged harassment consisted of various incidents including, amongst others: the meeting of 17 May 2004; the final warning; the administrative discharge; the failure to remove pornographic pictures from the military transport restroom. She also complained that the long hours required of her also constituted harassment.

High Court

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The employer was liable under the 1997 Act.

In order to establish harassment under the 1997 Act, there must be conduct which (i) occurs on at least two occasions; (ii) is targeted at the claimant; (iii) is calculated in an objective sense to cause alarm or distress; and (iv) is objectively judged to be oppressive and unreasonable.

In the present case, the actions of Major McCaffrey on 17 May 2004, when the claimant was left without a job and told to repay a month’s salary, constituted oppressive and unreasonable conduct. The view had clearly been formed that the claimant was a troublesome and challenging employee, and Major McCaffrey had wrongly sought to use an innocent administrative error as a means of attempting to rid the regiment of her. Similarly, the final written warning was unfair and unjust, given that her continued absence was due to correctly certified medical unfitness for normal duties, and her “apparent predilection to seek reprisal for any apparent wrongdoing” amounted to no more than two complaints, which she had a right to make. The discharge in June 2005 was also unfair and unjust, given that the claimant had been unable to return to her normal duties due to ill health and in respect of which appropriate medical certification had been provided. The warning and the discharge were unacceptable and oppressive and had one purpose: to get rid of the claimant. The behaviour of the employer in failing to remove the pornographic pictures from the military transport restroom was also oppressive and unacceptable. Given that the claimant was the only female full-time driver using the room, such actions can be construed as being directed at her.

The other incidents relied on by the claimant were not oppressive and unreasonable. In particular, the fact that the hours the claimant could be required to work could be late and/or lengthy did not amount to harassment of the claimant: the hours were a part of the job.

General damages would be awarded in the sum of £5,500, and special damages would be awarded in the sum of £1,060.

**Veakins v Kier Islington Ltd [2010] IRLR 132**

*The potential of the PHA appeared to be cut back by Conn v Council of the City of Sunderland. In Veakins, Lord Justice Maurice Kay says that “the primary focus is on whether the conduct is oppressive and unacceptable, albeit the court must keep in mind that it must be of an order which ‘would sustain criminal liability.’”*

**The facts**

Judy Veakins was employed by Kier Islington Ltd as an electrician, initially as a trainee, from September 2003. In July 2005, Jackie Lavy became her supervisor. They had an initial dispute over unpaid wages, leading to Mrs Lavy rebuking Miss Veakins in front of others. Miss Veakins felt that Mrs Lavy persistently picked on her, singling her out from her fellow employees for no reason at all. There were further disputes about time-
keeping and about Mrs Lavy requiring Miss Veakins to sign an “in-and-out” register every day. Miss Veakins complained about Mrs Lavy changing the existing practice about Miss Veakins being picked up on the way to a particular job by other workmen. Miss Veakins wrote a letter of complaint to Mrs Lavy, which Mrs Lavy ripped up in front of her without reading it. There were also complaints about office gossip. Mrs Lavy had asked other employees questions about Miss Veakins’ private life, as Miss Veakins saw it, to arm herself with useful material for a campaign of victimisation.

Miss Veakins went on sick leave for clinical depression from September 2005 until June 2006, when she decided to terminate her employment. She brought proceedings in the county court against her employer seeking damages for harassment under s.3 of the Protection from Harassment Act 1997. Her evidence was not challenged, and the employer called no evidence itself. Moreover, the employer did not dispute vicarious liability if harassment were established. Nonetheless the recorder decided that the proven acts did not amount to harassment under s.1 of the Act. He held that according to case law including the House of Lords’ decision in Majrowski v Guy’s and St Thomas’s NHS Trust and the Court of Appeal’s decision in Conn v Sunderland City Council he had to bear in mind that harassment under s.1 not only afforded a civil remedy under s.3 but also constituted a criminal offence under s.2. He held that in the present case no sensible prosecuting authority would have prosecuted Mrs Lavy, and any such prosecution would have been brought to an end as an abuse of process. He dismissed the claim. Miss Veakins appealed.

**Court of Appeal:**

The recorder had erred in finding that the conduct complained of did not amount to harassment under the Act.

In considering whether conduct constituted harassment under the Act, the primary focus is on whether the conduct is oppressive and unacceptable, as opposed to merely unattractive, unreasonable or regrettable, albeit the court must keep in mind that it must be of an order which would sustain criminal liability.

In the present case, the recorder had adopted an erroneous approach, in that he had not evaluated the evidence against the primary requirement that the conduct must be oppressive and unacceptable. In a case where the claimant's evidence had been accepted by the trial judge, and there was no contrary evidence, the appellate court was at no disadvantage when it came to the evaluation of that evidence. The account of the victimisation, demoralisation and reduction of a substantially reasonable and usually robust woman to a state of clinical depression was not simply an account of unattractive and unreasonable conduct, or the ordinary banter and badinage of life. It self-evidently crossed the line into conduct which was oppressive and unacceptable. It might be that, if asked, a prosecutor would be reluctant to prosecute, but that was not the consideration, which was whether the conduct was of an order which would sustain criminal liability. In the event of a prosecution, the proven conduct would be sufficient to establish criminal liability. The proceedings would not be properly stayed as an abuse of process.

Accordingly, the appeal would be allowed, and a finding for Miss Veakins on liability would be substituted for the recorder’s decision. The matter would be remitted to the county court for damages to be assessed.
Observed (per Lord Justice Maurice Kay):

Since *Sutherland v Hatton*, it has become more difficult for an employee to succeed in a negligence action based on stress at work. It seems that this may be causing more employees to seek redress by reference to harassment and the statutory tort, although it is doubtful whether the legislature had the workplace in mind when passing an Act that was principally directed at “stalking” and similar cases. Nevertheless, there is nothing in the language of the Act which excludes workplace harassment. It should not be thought from this unusually one-sided case that stress at work will often give rise to liability for harassment. It is far more likely that, in the great majority of cases, the remedy for high-handed or discriminatory misconduct by or on behalf of an employer will be more fittingly in the employment tribunal.

**Employment Tribunal decision (taken from TUC Risks 514) (16 July 2011)**

A worker advised by his doctor not to return to stressful work after suffering a stroke has been awarded nearly £400,000 in compensation after his employer indicated stress and long hours were part of the job. Jonathan Jones, a branch manager in Wales for builders' merchant Jewson, was dismissed on the grounds of incapacity five months after he suffered a stroke in April 2009. An August 2010 employment tribunal in Cardiff had accepted that Jewson Ltd discriminated against the 56-year-old, after sacking him from his branch manager position in Cardigan. Prior to the stroke, he was averaging more than 60 hours at work per week and had not taken his full holiday entitlement. Mr Jones’ doctor stated that he would need to avoid stress at work in order to return to his employment but Jewson decided that no role at the company would be without stress and so decided to dismiss him. The tribunal found that the dismissal amounted to disability discrimination as the employer had failed to make reasonable adjustments. At an employment tribunal remedy hearing last week, Mr Jones was awarded a £390,870.58 payout from Jewson, part of the global building material giant Saint Gobain. The company had offered just £57,206. Mr Jones' solicitor, Stephen Jackson of Cardiff-based Jackson Osborne employment lawyers, said his client ‘...had to endure tactics of delay, unfounded allegations and obstruction. He has lost his career after 21 years of service working, as the tribunal accepted, more than 60 hours a week without taking holidays. For a company which is part of a £20bn turnover, the whole affair was handled very badly.’
Useful contacts

Equality and Human rights Commission
Go to www.equalityhumanrights.com for further information.
employee Assistance professional Association (eApA)
Information on Employee Assistance Programmes Tel 0800 783 7616
Acas equality services
Advice and consultancy services on diversity in employment Tel 08457 47 47 47
suggested further reading
Harassment at Work
sensitive issues in the Workplace
S Morris.
no excuse: beat bullying at work – The pack includes video, facilitator’s guide, TUC guide
for trade union representatives and personnel managers, and a book Harassment, Bullying
and Violence at Work by Angela Ishmael and Bunmi Alemoru. The Industrial Society,

BASIC KEY SOURCES

• Government website:
  https://www.gov.uk/workplace-bullying-and-harassment

• ACAS
  http://www.acas.org.uk/media/pdf/l/r/Bullying_and_harassment_employer_2010-
  accessible-version-July-2011.pdf

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• Health and Safety Executive (“HSE”):
http://www.hse.gov.uk/stress/furtheradvice/informationonbullying.htm

• CIPD:
http://www.cipd.co.uk/hr-resources/factsheets/harassment-bullying-at-work.aspx

**Biography**

Damian McCarthy is an experienced employment lawyer. He is regularly instructed on high profile cases and has a number of well-known clients. He recently advised and acted for Moira Stuart in her employment dispute with the BBC and in high profile sexual harassment case involving a female banker (see below).

He excels at advocacy and has a reputation as a tough and extremely effective advocate; he possesses “all the gears” adopting an aggressive or a more charming approach as the case demands.

He has a client focused approach to get the result needed by the client and can get to the heart of a case very quickly, dispensing with extraneous issues in order to focus on the central parts of a claim and save time and costs.

Damian is popular with blue-chip companies, local authorities and trade unions in Employment Tribunal claims: particularly claims of discrimination, stress at work, large bonus claims and other area of employment law.

Recent examples of cases include the following (cases have been anonymised, as appropriate):

**B v S**
The case of a city currency trader for a national bank who was allegedly denied a large bonus, subjected to disability discrimination and dismissed. Sums involved are several million (sterling).

**HT v H**
The case of alleged sexual harassment and discrimination of a female banker extending back to 1998. Continual coverage in national newspapers and other media.

**A and Ors v F M C**
A complex case involving a claim by eight trade union members who brought a claim against for (1) dismissal connected with a TUPE transfer (2) trade union related dismissals and (3) breach of the Human Rights Act.

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The case was a complex mixture of law and fact in relation to each of the claims. The case was unique in that it entailed the Respondent breaching the Claimants' human rights repeatedly tape recording the Claimants during employment and following them (post-dismissal) to covertly tape record them. The Claimants were successful in their claims for unfair dismissal and damages of 5 figures were awarded against FMC. It was reported in several journals.

OTHER CASES

- An equal pay test case, worth several million pounds, brought by several hundred cleaners within a local authority.
- A test case brought by IPMS trade union on behalf by livestock workers alleging less favourable treatment on the ground of their fixed-term contractual status. The claims were all successful. The case was defended by Peter Wallington QC at the remedy hearing. The Claimants were successful and settled for significant sums.
- A claim brought by two hotel managers claiming race and sex discrimination against a national hotel chain.
- A disability discrimination claim brought by a teacher alleging bullying/stress related illness and a failure to make reasonable adjustments.
- A "whistleblowing" claim brought by an accountant alleging the theft of several million pounds from clients.
- Routinely advising on stress, bullying and disability discriminations claims for employees and employers.
- A breach of contract claim brought by a Director of a large company, owed just over a million pounds under his contract.
- A test case brought by several hundred employees in relation to industrial deafness.
- A test case brought on behalf of work-related upper limb disorder case of (Mountenay and Ors v Bernard Matthews)

RECENT MEDIA COVERAGE

- Interviewed for ITV one o'clock news and Channel 4 News concerning the law and social mobility;
- Interviewed for Law in Action;
- Interviewed on Manchester evening TV concerning M v G (see above);
- Interviewed and quoted in the Sunday Times (June 2009);
- Front page of The Law Society Gazette (18 June 2009);
- Currently involved in a national documentary concerning G4S and three national newspapers with coverage of M v G.

Qualifications

University of Warwick (LLB Hons).
University of Leicester (LLM, Masters in Employment Law).

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