

Employer Liability for Consequences of Teacher Stress – House of Lords Decision

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In *Barber v. Somerset County Council* the House of Lords recently delivered an important decision in relation to the principles applicable to determining whether an educational employer is liable for the health consequences to a teacher of a stressful work environment. The decision can be read at www.bailii.org/uk/cases/UKHL/2004/13.html.

The decision is of significance, and of considerable practical importance, in its analysis, by an ultimate Court of Appeal, of the application of legal principles to an educational employer's response to a problem with which virtually all educational authorities must grapple.

Background

In an important and much noted decision of the English Court of Appeal in February 2002, important principles (endorsed by the House of Lords in *Barber v. Somerset County Council*) were enunciated when four such cases, including Mr Barber's case, were considered. The case is entitled *Sutherland v Hatton* and can be accessed at www.bailii.org/ew/cases/EEWCA/Civ/2002/76.html. The trial judge held the employer liable and awarded damages to Mr Barber. The Court of Appeal reversed its decision. It said that this was 'a classic case' in which it was essential to consider 'at what point the school's duty to take some action was triggered, what that action should have been, and whether it would have done some good'. The court indicated that holding that stress at work could make a material contribution to the illness was not sufficient to lead to the conclusion that the school was in breach of duty, or that its breach had caused the harm (damage to Mr Barber's health). On the basis of the Court of Appeal's analysis of the findings of fact, it held that it was 'difficult indeed to identify a point at which the school had a duty to take the positive steps identified by the Judge'. It concluded that the evidence, even taken at its highest, did not sustain the finding of a breach of the duty of care.

Principles

Before turning to the facts and to the consideration of this finding by the Court of Appeal, it is important to note the detailed principles enunciated by the Court of Appeal and approved by the House of Lords. They appear as follows:

- (1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.
- (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a)

an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).

- (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.
- (4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.
- (5) Factors likely to be relevant in answering the threshold question include:
 - (a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?
 - (b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?
- (6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.
- (7) 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.
- (8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.
- (9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.

- (10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.
- (11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.
- (12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.
- (13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.
- (14) The claimant must show that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.
- (15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
- (16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event.

The Facts

Mr Barber took early retirement at the end of March 1997 (when he was 52 years old) after suffering a mental breakdown at school in November 1996. Since then he has been unable to work as a teacher, or to do any work other than undemanding part-time work. He sued his employer for damages for personal injuries (principally in the form of serious depressive illness).

A staff restructure at the school had been carried out, involving loss of staff and redistribution of work. As a result, Mr Barber was working between 60 and 70 hours a week, including returning to the school in the evening and working through weekends and over mid-semester break periods.

By late 1995/early 1996 the strain was becoming apparent and close relatives expressed concern about the impact of his work upon him, even suggesting that he take early retirement or look for another position. He returned to school in the new year and by the (English) spring of 1996 felt worse. He expressed concern to some appropriate people about the impact of the work upon his health.

By May 1996 his doctor recommended he should take some time off and at about this time was diagnosed as suffering from depression. After three weeks off, he returned to work in June and had further discussions with members of the school management team in June and July. In November 1996 he had a nervous breakdown, which resulted in his being unable to continue as a teacher and in his instituting legal proceedings for damages.

The House of Lords

The principal decision was delivered by Lord Walker of Gestingthorpe, with whom Lord Bingham of Cornhill and Lord Steyn agreed, adopting the reasons given by Lord Walker of Gestingthorpe. (Lord Rodger of Earlsferry agreed with the majority in allowing the appeal and in restoring the original judgment in favour of Mr Barber but gave separate reasons. Lord Scott of Foscote dissented and would have dismissed the appeal).

Lord Walker of Gestingthorpe noted that Mr Barber did not challenge *‘except on peripheral points and matters of emphasis’* the principles of law set out in the judgment of the Court of Appeal. He noted that Somerset County Council *‘while not uncritical of the Judge’s judgment’* did not challenge any of his findings of primary fact. Accordingly, the main issue for the House of Lords was whether the Court of Appeal was right to conclude, as it did, that the evidence before the Judge did not, even taken at its highest, sustain a finding that the County Council was in breach of the duty of care which it owed as an employer to Mr Barber.

Counsel for the County Council urged that the House of Lords should distinguish clearly *‘between what Mr Barber himself thought or felt about his state of health at different times during the last year of his teaching career; and what he communicated about it to his employer’*. Lord Walker stated that he *‘readily’* accepted that that was *‘a point of great importance to the disposal of this appeal’*.

Lord Walker identified by an analysis of the documentary evidence the first occasion on which the school’s senior management team might have realised that something was going seriously wrong with Mr Barber, noting that *‘...he was a senior, hard working and conscientious teacher missing three weeks in the middle of the summer term, despite the extra work which (as he must have known) his absence would place on the shoulders of his hard working colleagues’*, adding that it *‘can hardly have escaped Mrs Hayward and her deputies ... that this was a disturbing development which called for inquiry’*.

Lord Walker identified as the best statement of general principle the following passage:

... 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; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.

Lord Walker observed that senior employees, especially professionals such as teachers *‘will usually have quite strong inhibitions against complaining about overwork and stress, even if it is becoming a threat to their health’*, noting that personal and professional pride, loyalty to

colleagues and the wish not to add to their problems and work load ‘*may all influence a teacher not to complain but to soldier on in the hope that things will soon get a little better*’.

The critical passages in this judgment read as follows:

My Lords, the issue of breach of the County Council’s duty of care to Mr Barber was in my view fairly close to the borderline. It was not a clear case of a flagrant breach of duty any more than it was an obviously hopeless claim. But the judge, who saw and heard the witnesses (including Mr Barber himself, Mrs Hayward and Mr Gill) came to the conclusion that the employer was in breach of duty, and in my view there was insufficient reason for the Court of Appeal to set aside his finding. The Court of Appeal was concerned about the timing of the breach, but for my part I do not think there is much room for doubt about that. The employer’s duty to take some action arose in June and July 1996, when Mr Barber saw separately each member of the school’s senior management team. It continued so long as nothing was done to help Mr Barber. The Court of Appeal evidently considered that Mr Barber was insufficiently forceful in what he said at these interviews, and that he should have described his troubles and his symptoms in much more detail. But he was already suffering from depression, and neither Mrs Hayward nor Mrs Newton was a sympathetic listener. What the Court of Appeal failed to give adequate weight to was the fact that Mr Barber, an experienced and conscientious teacher, had been off work for three weeks (not two weeks, as the Court of Appeal thought at para 160) with no physical ailment or injury. His absence was certified by his doctor to be due to stress and depression. The senior management team should have made inquiries about his problems and seen what they could do to ease them, in consultation with officials at the County Council’s Education Department, instead of brushing him off unsympathetically (as Mrs Hayward and Mrs Newton did) or sympathising but simply telling him to prioritise his work (as Mr Gill did).

It was argued that the school as a whole was facing such severe problems (with all the teachers stressed and overworked, no budget for more staff, and the Ofsted inspection looming) that there was nothing that the school could have done to help Mr Barber other than advising him to resign, or in the last resort terminating his employment (a point on which the Court of Appeal made some observations in para 34 of its judgment). I would not accept that. At the very least the senior management team should have taken the initiative in making sympathetic inquiries about Mr Barber when he returned to work, and making some reduction in his workload to ease his return. Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might by itself have made a real difference. In any event Mr Barber’s condition should have been monitored, and if it did not improve, some more drastic action would have had to be taken. 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’.

Significance

The explicit endorsement of the principles (praised in the literature) adopted by the Court of Appeal is, of course, an important feature of the case. Although the House of Lords disagreed in the result, the difference related to an analysis of the facts rather than to any fundamental issues of principle.

On the facts, the significance of the decision lies in the acknowledgement of the commonly observed behaviour patterns of professional employees facing stressful situations and in the identification of the failure by the school senior management team to respond to the clear communication (in this context) of Mr Barber's problems to the school's senior management team. Additionally, it is significant that the court acknowledged the importance to potential psychological injury of 'a small reduction' in duties particularly when coupled with '*the feeling that the senior management team was on his side*'.

It is submitted that this decision is characterised by its careful analysis of principle and its realistic approach to the context in which such problems are known regularly to arise and the significance to determining liability of the knowledge of educational employers of these matters.