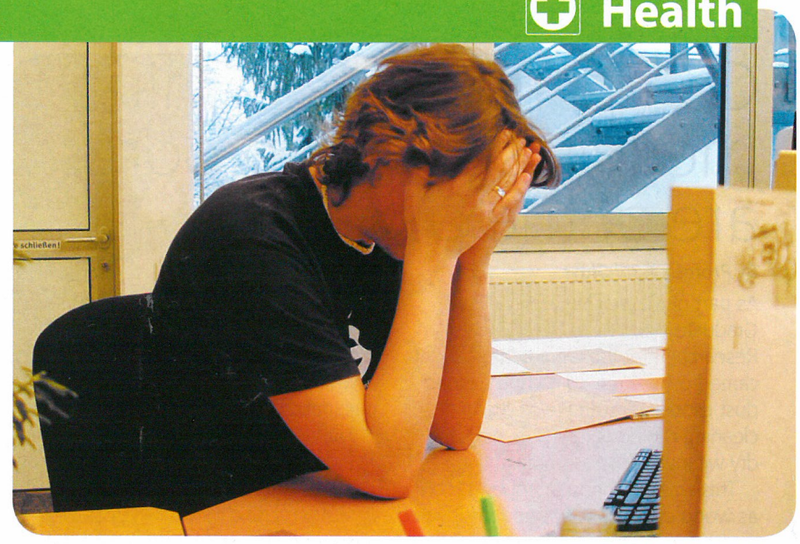
Workplace stress: is your business protected?

By Catherine Stewart



There are many different ways that an employee may be able to bring a claim for workplace stress: raising a personal grievance for 'disadvantage' in the workplace, bringing proceedings for breach of an implied term to provide a safe workplace, seeking a compliance order to rectify excessive stress, or even going on strike on the grounds of health or safety. If an employee is faced with excessive stress to the point where they have no real option but to resign, they might bring a claim for constructive dismissal. Moreover the health and safety legislation defines hazard and harm to include stress – opening the door for OSH to prosecute businesses for workplace stress in appropriate cases.

All of this may sound rather daunting to employers. If, like many employers, you tremble at the first mention of the word stress from an employee, you may take some comfort from the fact that the courts have applied certain thresholds for stress claims to succeed. Furthermore, there are many practical steps that you can take to help protect your business from such claims.

In order for an employee to establish that an employer has breached its duties to provide a safe working environment, the employee needs to show that the employer knew, or ought to have known, that there was a real risk of harm to the employee and that it failed to take reasonably practical steps to avoid that risk. Reasonable steps will depend on such things as the level of the risk of the harm, the seriousness of the harm that may occur, the justification for running the risk and the cost and practicability of preventing it.

Whether the employer ought to have known about the risk of harm is often called "foreseeability". The employer's liability arises if the employer could reasonably have foreseen that the employee would suffer workplace harm.

Many of you may know stoic employees who take on heavy workloads without complaint and eventually burn out. Those employees may find it harder to show that the injury to their health was foreseeable than their more assertive colleagues, who make complaints and are nevertheless ignored. Two cases below illustrate this point.

In a case where I worked as counsel to the claimant , that of Gilbert v Attorney General in 2000, a probation officer, Mr Gilbert, worked in difficult conditions in South Auckland, with a very heavy case load, including the most serious recidivist offenders. His repeated and long-standing concerns expressed to his employer about the situation were dismissed. The court upheld Mr Gilbert's claim for workplace stress and awarded him 15 years' future salary, based on his salary projected through to retirement date, medical expenses and significant awards for general compensation and costs.

More recently, in the case in the 2009 Mitchell v Blue Star Print Group (NZ) Ltd, the court held that Blue Star did not act on Mr Mitchell's complaints or even take them seriously. Over the course of around six months Mr Mitchell raised complaints verbally, submitted two formal reports about work injuries, wrote a letter describing his work pressures and asked the company to remedy the problem. The employer did not respond to these complaints or take any steps to investigate or take action (until OSH became involved and made some specific recommendations). The Employment Court found the employer was on notice of Mr Mitchell's stress and it was reasonably foreseeable that he would not want to return to work and upheld his claim for constructive dismissal.

Foreseeability does not always need to arise from an employee making direct complaints, however. There can be other ways that the possibility of harm should be plain enough for any reasonable employer to do something about it. For example, if an employee is taking increasing amounts of sick leave, if other employees are expressing concerns about an employee's ability to cope, or if an employee's workload is particularly challenging or demanding – these may all be signs that the employee is suffering from stress and that something needs to be done. There may also be extreme circumstances in the workplace which give rise to a real risk that staff's mental health and safety could be endangered if specific support is not provided. Coal miners who narrowly escape a gas explosion, or bank tellers subjected to an armed robbery, are examples of situations where it could reasonably be expected that the employees would need some support to recover.

Besides foreseeability, the employee also needs to show that the workplace stress actually caused or materially contributed to their health injury. There may have been other factors which contributed to their health situation, such as stresses in their personal life. The employer's liability should only reflect what is properly attributable to the breach of their obligations, not to other matters outside of their control.

There can be no doubt that workplace stress is also a "two way street". The employee also has obligations to look after their own health and, like the employer, has duties under the Employment Relations Act to act in good faith and be responsive and communicative in the employment relationship.

What are the practical steps that an employer can take to minimise the risk of workplace stress claims?

As a starting point it is good practice for employers to have effective policies which manage occupational stress. This may include identifying work-related stressors; making sure of the balance of work and rest for employees; having mechanisms in place for dealing with workplace conflict and difficulties; having strategies in place for communicating about work issues; providing employee assistance programmes (such as confidential counselling); debriefing or rotation of particularly difficult or stressful projects; and giving employees the opportunity to become involved in workplace health and safety matters.

Employers should remain vigilant for signs of workplace stress, by, for example, monitoring absenteeism, staff turnover and being alert when others have suffered stress in the same job. It is better to be proactive in dealing with problems rather than just simply "hoping the issue will go away".

If an employee makes a complaint of workplace stress, take their complaint seriously, investigate it and where appropriate, take action. it is critical that the employer does not dismiss stress-related complaints without careful consideration.

It is also desirable, when dealing with a complaint, to obtain a medical diagnosis and some employment agreements expressly address this issue. The word stress on a medical certificate, for example, is vague and it is better to know what kind of medical condition the stress has caused or is affecting in order to effectively manage the problem.

After a complaint has been made it is important to take steps to minimise further harm to the employee. If the employee has been off work then manage their return to duties effectively and where necessary implement changes to the workplace to ensure that it will be safe for them.

In summary, don't become stressed about stress! Taking practicable and responsible actions as an employer will greatly alleviate the risk of stress claims – not to mention the added benefits of having a happy, healthy workplace.

This article is general in nature and is not intended as a substitute for legal advice.

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