

The test **STRESS**

Andrew Rayment

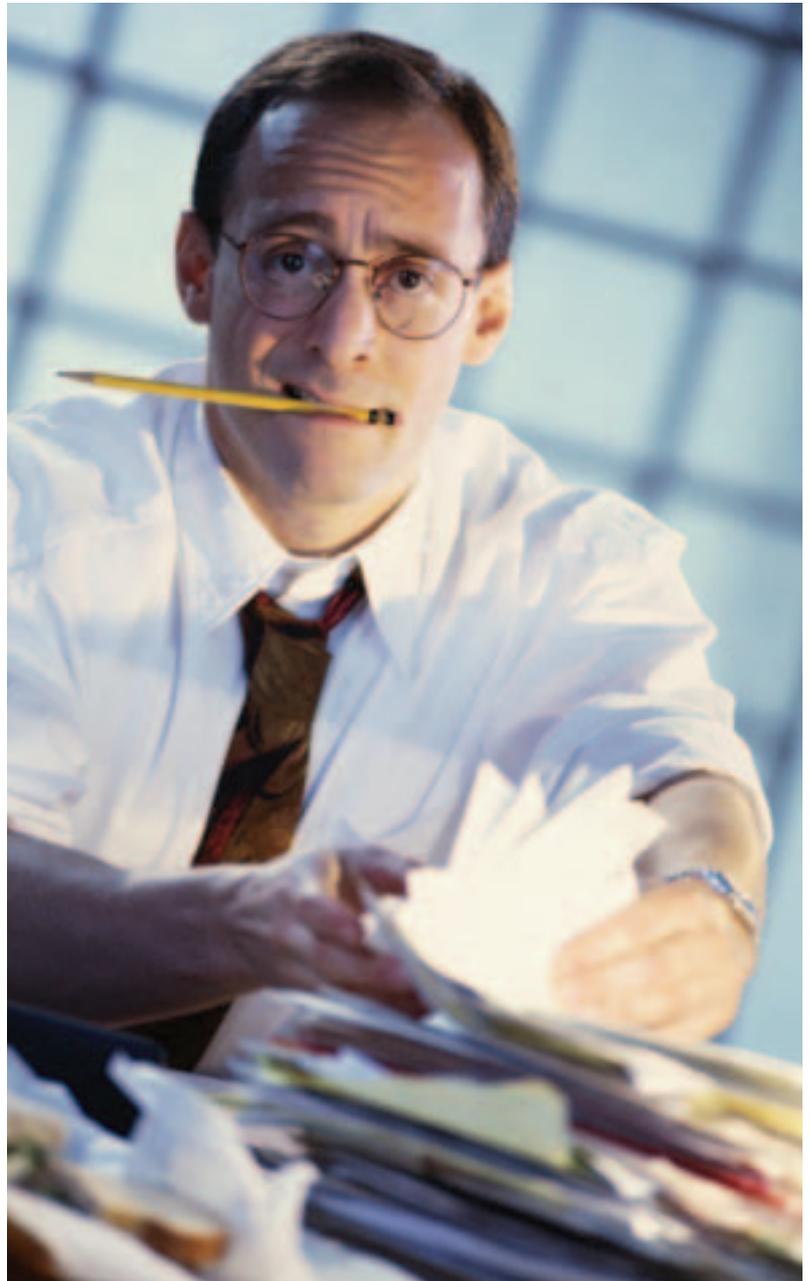
Research commissioned by the Health and Safety Executive suggests that half a million people in the UK experience work-related stress at a level they believe is making them ill, with up to five million claiming they feel 'very' or 'extremely' stressed by their work. Almost thirteen million working days were lost to stress, depression and anxiety last year with all the financial and resourcing implications that has for UK plc.

Not so long ago, a traditional 'stiff upper lip' approach to the issue of stress prevailed in the British workplace. While it was accepted that employers had a duty to protect their employees from physical injury, intangible conditions like depression and anxiety were quite outside the accepted remit of employment law.

However, this has begun to change as lawyers find new and inventive ways for aggrieved individuals to take action against current and former employers for stress. Initially stress claims were presented as personal injury claims, but recently, and perhaps more worryingly for employers, we have seen the novel use of other legislation, such as the Protection from Harassment Act 1997 – a piece of legislation that was principally brought in to protect people from stalkers!

The increasing use of the Harassment Act has changed the legal landscape, thanks to some significant differences in its requirements. Personal injury claims must generally be brought within three years of the 'offence', whereas claims under the Harassment Act can be made up to six years later. In addition, claims brought under personal injury legislation must offer evidence of a specific injury, so stress claims must provide medical evidence of stress. However, the Harassment Act refers to 'anxiety' – emotional upset or injury to feelings, terms which have no strict medical analysis and which are far more difficult to prove – especially up to six years later!

But perhaps the most problematic aspect of the Harassment Act is the fact employers can be held vicariously liable for claims. If one employee is



Stress now costs UK plc more lost working days than physical injury. Andrew Rayment examines the challenge for employers.

harassing another, the employer can ultimately be held responsible for this, even if they were quite unaware of the offence.

Litigation

Two recent cases in which claims have been made against employers on the

grounds of vicarious liability are *Banks v Ablex Ltd* [2005] and *Majrowski v Guy's and St Thomas' NHS Trust* [2005].

In *Banks v Ablex Ltd*, the claimant argued that the aggressive and abusive behaviour of her co-worker, which included an assault, amounted

to harassment under the Act. The Court of Appeal ultimately held that this conduct did not amount to harassment because there was no 'course of conduct', as defined in the Act, which requires the harassment to occur on at least two occasions. The question of vicarious liability was therefore not specifically addressed by the Court of Appeal in their judgement.

In *Majrowski v Guy's and St Thomas' NHS Trust*, an employee claimed that he was bullied, intimidated and harassed by his department manager. She was, he claimed, excessively critical, refused to talk to him, was rude and abusive and set unrealistic targets. He claimed that the conduct of his fellow employee amounted to harassment under the Harassment Act, for which the employer was vicariously liable. The County Court judge originally struck out the claim on the basis that the employer couldn't be held to be vicariously liable. However, the Court of Appeal reversed this decision, although the question of whether Mr Majrowski was in fact harassed within the meaning of the Harassment Act will be left to the County Court to decide. An appeal has been lodged with the House of Lords.

Whether it is fair to impose vicarious liability depends on how close a connection there is between the acts complained of and the normal and expected duties of the employee. Was the act done in the 'course of his employment'? In the cases of *Lister & Ors v Halesley Hall* (2002) and *Dubai Aluminium v Salaam & Ors* (2003), the courts declared that there has to be a focus

on the nature of the job and whether the harassment was linked to their employment. Ultimately, each case will have to be treated individually, but it is certainly worth noting that there are cases of employers being held liable for employees stabbing and shooting others, so a bit of workplace bullying seems mild by comparison!

If we examine the various precedent-setting cases, we can see that:

- The action must have occurred on at least two occasions, to the same victim and must be intentional
- A claim may be brought by anyone against an employer under the Harassment Act alleging harassment by an employee, whether the victim was an employee or not
- An employer may be completely unaware of the harassment and the harassment need not be foreseeable for the employer to be liable
- Anxiety will suffice as a recognisable psychiatric condition that can trigger an award of damages.

The precedents set by the *Majrowski* case to date are ominous for employers. They considerably extend the liability of employers, allowing harassment claims that fall short of negligence by the employer or that don't have a strong medical basis. Claimants will no longer have to prove foreseeability of harm, and any claims are in addition to those which can be brought in the Employment Tribunal under



discrimination legislation. Moreover, employers will no longer be able to rely on the potential defence that they should not be held liable for the actions of employees. The extension of the claim period from three to six years could also lead to the courts being flooded by weak and dubious cases.

If employers can be held to be vicariously liable, how much could they be liable for?

Precedents set by recent cases suggest that damages will generally not exceed £25,000 for simple injury to feelings, but if the affected person is left unable to work, unlimited damages are possible (subject to standard legal principles). Additionally, and worryingly for employers, employers' liability insurance will probably not cover claims for anxiety.

Generally speaking, most employers are aware of the need to monitor and combat stress in the workplace. It is, after all, in their own interest even if no claims are brought to court: a highly stressed employee is unlikely to be productive, good at their job or easy to get along with.

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