

# Workplace counselling and the duty of care.

## The case continues...

**Peter Jenkins** keeps an eye on the changing landscape

Most workplace counsellors will be familiar with the Hatton<sup>1</sup> case setting out the standard for work-related stress claims. Many could probably recite the section of the judgment which says that employers providing a confidential counselling service are unlikely to be found to be in breach of their duty of care to employees. However, the Hatton case largely dealt with four cases where counselling provision was not a major issue. A more recent case, where the employer did provide workplace counselling but was still found to be liable for an employee's work-related stress, adds a further chapter in the unfolding saga of litigation for workplace stress.

The case was brought by Tracy Ann Daw, a payroll analyst working for Intel Incorporation (UK), for events leading up to a psychiatric breakdown and attempted suicide in June 2001. In the original personal injury action heard in 2006, the judge had awarded her £125,000 damages. Intel appealed against this judgment on the basis that the company had actively responded to reduce the significant level of stress she was experiencing in her job, and also that a counselling service and medical assistance was fully available to her as an employee. Both arguments were rejected, raising some important questions about the status of workplace counselling as a ready-made shield against employee claims for job stress.

### Hatton case and workplace stress

The Hatton case of 2002 set out the basic parameters for deciding cases brought for workplace stress – shorthand for 'foreseeable psychiatric injury caused by breach of employer duty of care' in legal jargon (see *box for summary*). Of crucial interest for counsellors, among these was the principle that employers providing a confidential counselling service would be unlikely to be found in breach of their duty of care. In that case, one of the original plaintiffs, Mrs Hatton, a teacher in a secondary school, had in fact received some stress counselling, but this fact was unknown to her employer. The implication of Hatton was that employers with a staff counselling service would practically enjoy immunity from claims.

So what happened in the Intel<sup>2</sup> case? Tracy Daw had worked for the company for 12 years, since a teenager. Her job as payroll analyst became increasingly complex over time, integrating new staff from Intel's frequent acquisitions. Reporting lines were confused and contradictory, with overlapping lines of accountability towards three different managers at one stage. She was provided with inadequate help, and had to work excessive hours to get her work done. She was seen by managers as committed and conscientious, with her interpersonal skills being noted at annual appraisal as being 'excellent' and her performance as 'outstanding'. Her workload, it was acknowledged, was 'being managed by excessive hours'.

### Recording concerns about overwork

Ms Daw had a history of postnatal depression, which was known to one, but not all, of her managers. When this manager found her in tears at her desk in early March 2001, he asked her to put her concerns in writing, which she did, in a very detailed email. In part of it, she referred to her previous onset of depression: *I cannot sustain doing the current level of work that I am currently doing. No one is getting a particularly good service, I am not enjoying what I am doing, bureaucracy is stressing me out (evidence*

#### Checklist for employer liability

- Is the individual subject to undue pressure of work that is:
  - unreasonable by any standard?
  - unreasonable judged in comparison with the workload of others in a similar job, or due to individual vulnerability known to the employer?
- Has the individual received an injury to health either physical or psychological, which is directly attributable to stress at work?
- Was this injury reasonably foreseeable by the employer?
- Is this injury directly and mainly attributable to the employer's breach of duty of care, in failing to reduce workplace stress (by providing confidential counselling, redistribution of duties, training, etc)?

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*by my violent mood swings – bad sign ... been here before – twice), HR/PX are demoralising me and I want out.*

The company responded by restructuring and by seeking to employ an additional member of staff, but this post was not filled. Ms Daw's health continued to worsen, and in May 2001 she saw her GP, who recorded: *Depressed again gradual [increase] in symptoms over [six months] due [to] stress at work – working 50-60 hours/week ... Does not want time off work.*

In June, after seeing occupational health, she was signed off work for three weeks by her GP for depression, and then attempted suicide.

In many ways, this runs a course which is probably all too familiar to many workplace counsellors. However, a crucial difference is that the company had provided counselling for employees. In fact, Ms Daw had previously had eight sessions of counselling from Intel's counselling service, when first off work with postnatal depression, for a period of four months. On the second occasion, she had been off work for almost a year, and had been under community psychiatric care.

### Intel: counselling inside?

The judge rejected Intel's claim that the counselling provision discharged their duty of care<sup>3</sup>, and that Ms Daw should have made proper use of this service. In fact, the latter had detailed some perceived limitations of the service, not set out in the judgment. These reservations may have underpinned her use of psychiatric services, rather than of the counselling service, during her second episode of depression. While the judge conceded that 'there will be cases in which an employee may be expected to take refuge in counselling services', this was clearly not one of them. Significantly, the judge found that 'whether the counselling service provided will be enough to discharge an employer's duty depends on the facts of each case'. In other words, the mere fact of providing an employee counselling service does not, on its own, eliminate the employer's legal liability for the welfare of its staff. In essence, the judge decided that this was a case of poor management, which failed to take urgent and appropriate action to deal with a known problem – an insupportable and stressful level of overwork.

On the face of it, this case seems to mark a fresh departure in terms of law on workplace stress, throwing everything up in the air for each case to be argued afresh on its own merits. However, this would be to misread the signs. A careful reading of the small print of the Hatton judgment suggests that the Intel case actually fits very closely within its template, rather than breaking the mould. The fine print of Hatton made it clear that counselling provision would not reduce liability where the employer 'has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear'<sup>1</sup>. So this case still sits firmly within the logic of Hatton – the employer was found to be acting unreasonably, despite the provision of a counselling service.

### Role of workplace counselling

So far, so good. However, the case still raises some difficult questions about the way that workplace counselling is perceived by the judiciary. The Hatton case was clearly based on the judge's careful annotation of various stress publications produced by the Health and Safety Executive, but was noticeably silent on the relative effectiveness of workplace counselling services. In the Intel case, the judge was sceptical of the value of short-term counselling in being able to help Ms Daw with her depression. Her decision not to make use of counselling on this, the third of her episodes of depression, was, therefore, seen to be a reasonable one. While client choice is an important factor, current research indicates that short-term counselling can be an effective option, to be considered in cases of depression. According to the NICE guidelines on depression<sup>4</sup>, 'In both mild and moderate depression, psychological treatment specifically focused on depression (such as problem-solving, brief CBT and counselling) of six to eight sessions over 10 to 12 weeks should be considered', particularly when combined with antidepressant medication.

Second, the judgment appears to see a relatively limited role for workplace counselling in such cases, restricted to making a referral to the GP, and to alerting management to the urgent action needed in an individual case. Workplace counselling is seen here primarily as an arm of occupational health, with limited potential for its professional autonomy and its own recognised expertise – it provides, essentially, a referral route to other services. While this may well be appropriate, it begs the question of whether early access to counselling might, on its own, be sufficient to accurately assess a risk of suicide, or allay the severity of actual depression, rather than simply serve as a conduit to other services.

Despite the continuing lack of clarity about the potential role of workplace counselling with regard to mitigating workplace stress, this recent case adds to our understanding of employer duty of care. In other words, 'good' counselling does not compensate for 'bad' management in the litigation lottery. Or as the judge put it, counselling is definitely not to be considered as 'a panacea' when it comes to deciding the limits to employer duty of care. ■

### References

- 1 Hatton v Sutherland [2002] 2 All ER 1
- 2 Intel Incorporation Ltd UK v Tracy Ann Daw [2007] EWCA Civ 70
- 3 Intel owed depressed employee more than counselling. [www.OUT-Law.com](http://www.OUT-Law.com) 12/2/2007
- 4 National Institute of Health and Clinical Excellence. Depression: management of depression in primary and secondary care. London: NICE; 2004.