STRESS AT WORK: TO TELL OR NOT TO TELL?

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In *Koehler v Cerebos (Aust) Ltd* (2005) 79 ALJR 845, the plaintiff sued her defendant employer on the ground that the workload required of her under her contract of employment was excessive and resulted in her suffering a depressive psychiatric illness. A unanimous High Court of Australia rejected her claim on the basis that the psychiatric injury she suffered was not a reasonably foreseeable consequence of the employer's conduct. Although such a result is defensible on the facts, the law relating to the liability of an employer for an employee's psychiatric injury remains somewhat uncertain.

Ms Koehler was employed as a merchandising representative of the respondent. She was employed full-time between November 1994 and April 1996 whereupon she was retrenched. However, she was immediately offered, and accepted, a three-day-a-week part-time contract but when she saw the work that was to be performed she protested that it could not be done in the time allotted. She was convinced to 'try it' for six months, during which time she complained, orally and in writing, that the workload was excessive. By October 1996 she reached the point where she could no longer continue and, after consulting her doctor over the manifestation of physical symptoms, was finally diagnosed with a major depressive illness.

At first instance the plaintiff was successful. It was accepted that her condition was the result of her workload and that, in light of industry standards, her workload was too much to maintain in three days and was similar to that of a full time employee. It was also held that the employer needed no particular expertise to foresee that there was a risk of injury of the kind that ensued (i.e. psychiatric injury) and that the employer had failed to take reasonable steps (such as increasing her hours or employing an assistant) to provide the plaintiff with a safe system of work. The employer appealed successfully, the Court of Appeal of Western Australia deciding the appeal on the sole ground that there was

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no material upon which it could be found that the employer should have been alerted to a potential risk of psychiatric injury to Ms Koehler.

Two judgments were delivered in the High Court dismissing the appeal. The majority (McHugh, Gummow, Hayne and Heydon JJ) agreed with the Court of Appeal that the injury to Ms Koehler was not reasonably foreseeable. Ms Koehler exhibited no signs of distress so as to suggest a risk of injury, and the complaints made by Ms Koehler were directed to whether the work could be done, not to the risks the work posed to her health. This narrow ground was sufficient for the majority to dismiss the appeal, and Callinan J agreed substantially with the majority.

By and large, the decision of the High Court is consistent with the approach taken by English courts in the 'stress at work' cases. However, the limited ground of appeal (as was the case in *Barber v Somerset County Council* [2004] 1 WLR 1089) prevented full consideration of the importance of the contractual position of the parties. However, enough was said by the High Court to suggest that this might be determinative in future cases; as the employee had agreed to undertake the work, 'insistence upon performance of a contract cannot be in breach of a duty of care' (at 850). Thus the idea that the contractual obligation had to be judged by reference to some external standard, which suggested that performance of the agreed work under the contract might be injurious to the employee's health, was rejected. These 'contractual context' arguments cannot be about the foreseeability of psychiatric injury. Unless every employee is put at risk of psychiatric injury by virtue of an employer's standard contract of employment – a scenario described by Lord Rodger in *Barber* as raising very different issues – the contractual workload of the employee gives no assistance in determining the foreseeability of psychiatric injury to the employee. Rather, the contract of employment is relevant to the steps that should be taken once psychiatric injury to an individual employee is foreseeable. Once the employer is aware of the risk of psychiatric injury, he must turn his mind to the steps that can be taken to alleviate this risk, and in determining what is reasonable the fact that the employee agreed to do the work is a primary consideration. Whether such pre-eminence should be given to the employment contract is another matter, but the approach in *Koehler* is consistent with the current High Court of Australia's reluctance to be seen as judicial activists; as the judgments make clear, the parties' contractual obligations might be subject to

legislative control but the court would not re-write the parties' bargain.

Koehler also demonstrates another feature of the 'stress at work' cases. Courts are more willing to make a finding of reasonable foreseeability of psychiatric injury where the injury relates not to the *amount* of work an employee undertakes but the *kind* of work they undertake. Thus in *State of New South Wales v Seedsman* [2000] NSWCA 119 the New South Wales Court of Appeal had no difficulty in finding that the psychiatric injury of a former police constable caused by her work with abused children was foreseeable, despite the absence of complaint at the time and of expert evidence suggesting that at the time of the exposure there was a risk of psychiatric injury from her doing the work. Similar results have been reached post *Koehler* (see *State of New South Wales v Fahy* [2006] NSWCA 64; *State of New South Wales v Burton* [2005] NSWCA 12). As was pointed out in *Melville v Home Office* [2005] EWCA, in this type of case it is enough that the employer foresees psychiatric injury to the class of employees at risk, so the lack of complaint by the individual employee is irrelevant. However, as modern employers cannot deny the *general* risk of psychiatric injury to employees as a consequence of stress caused by overwork, a rationale is needed for treating one class of stressed employees more favourably than another.

Undoubtedly, the decision in *Koehler* puts the over-stressed employee in a difficult position. Making no complaint may lead to a finding that any resultant psychiatric injury was unforeseeable and that the employer was merely requiring the employee to abide by the contract of employment. Conversely, making the employer aware of the problem may be taken as an admission that the employee cannot perform the job and lead to the loss of a much-needed employment. Perhaps the only way of avoiding this result is through legislation.