Case No: HQ13X05520

Neutral Citation Number: [2015] EWHC 880 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2015

Before :

MR JUSTICE WILLIAM DAVIS

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Between :

Karl Michael Lee Easton	**Claimant**
- and -	
B & Q Plc	**Defendant**

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Mr Andrew Buchan and Miss Tamar Burton (instructed by **Thompson Smith & Puxon**) for the **Claimant**
Ms Farrah Mauladad (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 16 - 20 March 2015

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Judgment

Mr Justice William Davis:

Introduction

1. The Claimant, Karl Easton, is now aged 48. He left school at 16 with modest academic qualifications. He went to work at a local Sainsbury's supermarket as a trainee butcher. He gradually worked his way up through the ranks at Sainsbury's. By 2001 he was the manager of a Sainsbury's supermarket in Colchester. Over the next three years he progressed with Sainsbury's. He eventually became the manager of a very large branch of Sainsbury's at Warren Heath, Ipswich with an annual salary of around £72,000. His abilities as the manager of a large retail outlet were identified by B & Q, the well-known chain of DIY stores. In 2004 he was recruited by B & Q as a unit manager i.e. to manage one of their stores.

2. Mr Easton progressed well with B & Q. At the beginning of 2007 he was seconded to the head office of the company to lead a small team which implemented a structural change in the range of products available in B & Q stores. In July 2008 he was appointed as the manager of the B & Q store in Romford. This store was about to undergo a substantial refurbishment. The previous manager in post, Simon Green, considered that he was not able to manage a project of this size. B & Q moved him to a smaller store in Ipswich as the manager of that store. Mr Easton was regarded highly by senior management at B & Q and was seen as a manager capable of overseeing the refurbishment and thereafter of reaping the benefits of the refurbishment. The expectations of the senior managers were borne out by events. The refurbishment was carried out successfully. The Romford store performed well thereafter. By March 2010 Mr Easton's total gross salary including bonuses and benefits was around £105,000.

3. It is against this background that Mr Easton brings his claim for damages for psychiatric illness and consequential loss caused by work-related stress. In May 2010 he was diagnosed as suffering from depression. Save for two very brief unsuccessful attempts to return to work in September 2010 and January 2012, Mr Easton never worked again for B & Q. His case is that his initial illness was caused by occupational stress and that this occupational stress was due to the negligence and/or breach of statutory duty on the part of B & Q. Further, he claims that B & Q were in breach of duty in their management of his return to work in September 2010 so as to cause a relapse of his illness. B & Q accept that Mr Easton has suffered a psychiatric illness and that the illness at least in substantial measure was caused by occupational stress. Their primary case is that Mr Easton's illness was not foreseeable at any stage. They say also that they did not act in breach of any duty whether prior to the onset of the psychiatric illness or at the time of the return to work in September 2010.

The witnesses

4. The evidence called on behalf of the Claimant was as follows:

   - Mr Easton himself.
   - Teresa Dedman, a Human Resources manager with B & Q.

- David Griffiths, a department manager at the Romford B & Q store.

- Anthony Blow, another department manager at the Romford store.

- Mark Walpole, the service manager at the Romford store – he and another man named Russell were the two senior managers working immediately under Mr Easton.

5. The Defendant called the following witnesses:

- Philip Russell, the stock manager at the Romford store – he was the other senior manager reporting directly to Mr Easton.

- Nigel Hughes, the regional manager with responsibility for the Romford store – he was Mr Easton's line manager.

- Tanya Lakey, a supervisor at the Romford store.

- Damien McGloughlin, the divisional director for the Eastern region of B & Q until about the end of 2009 – the Romford store was one of around 80 stores for which he was responsible and he was Mr Hughes's line manager.

- Craig Black, the regional manager for East Anglia – he was Nigel Hughes's counterpart for that part of the country and he was involved in Mr Easton's first managed return to work in September 2010.

- Ian Herrett, a director of B & Q.

- Simon Green, the manager of the B & Q store at Ipswich at which Mr Easton's first return to work was attempted – he had been the manager of the Romford store prior to Mr Easton's appointment.

6. In general terms I am satisfied that the witnesses who gave evidence were doing their best to give accurate evidence about the matters to which they referred. Since the events about which they were speaking occurred in 2010 and earlier, there is ample room for honest mistake on the part of all of the witnesses. In those circumstances I have paid particular attention to contemporaneous documents (where available) and to accounts given by witnesses much nearer in time to the events i.e. in the course of a B & Q grievance procedure instigated in 2011 by Mr Easton. In relation to Mr Easton's own evidence I take into account that he views the events of 2010 and earlier through the prism of a genuine and significant psychiatric illness which is attributable to his work with B & Q. That has affected the accuracy of his recollection of some events and it has had an effect on his perception of what was said and done by senior managers at B & Q.

7. It is argued on behalf of Mr Easton that the witnesses called by B & Q (with one exception) are still employed by that company and that they should be regarded as partial. There was no investigation with the witnesses of the supposed effect on their evidence of their continued employment with B & Q. In his closing submissions on behalf of the Claimant Mr Buchan noted that Mr Russell had an ambition to be a store

manager. Whilst it is true that Mr Russell gave this evidence, he was given no opportunity to meet the suggestion – even now only implicit – that his ambition had affected his evidence. I am unimpressed by the submission that the evidence of the witnesses called by B & Q should be given less regard simply because of their continued employment with the company. I also consider that there is little assistance to be gained in my assessment of the evidence of the Claimant's witnesses from the fact that they are not employed by B & Q. It is said that their attendance shows the high regard in which they held Mr Easton as a manager and their strength of feeling about the Romford store. The former point is not in issue. B & Q's case is that Mr Easton was a high performing manager. As to the latter, whether a witness feels strongly about something is not a proper indication that he or she is giving accurate evidence. It may be a trigger for exaggeration. I have assessed the evidence of every witness in the same way. Is the evidence internally consistent? How does it fit with contemporaneous documentation? How does it fit with other evidence given in the case? Is there anything inherently improbable about the evidence?

8. There is one witness on whose evidence I am satisfied it would not be safe to rely, namely Mark Walpole. In July 2010 he wrote to a Human Resources manager at B & Q raising a grievance in respect of his treatment by Mr Easton. He alleged that he had been regularly bullied and intimidated by Mr Easton. He said that he had been forced to do all of the early and late shifts at the store, Mr Easton not being part of the shift rota. His letter in July 2010 did not mention (other than in passing) any particular problems with the store before Mr Easton's illness. Subsequently Mr Walpole brought proceedings in the Employment Tribunal against B & Q. He made a witness statement in those proceedings, a copy of which was provided to me. In that statement he set out various difficulties experienced in the store in the later part of 2009 and in the first few months of 2010. However, he also catalogued the bullying which he said had been carried out by Mr Easton, this behaviour continuing up to May 2010. On the 17th March 2015 – which was the second day of the hearing of this claim – Mr Walpole made a further witness statement to the solicitors instructed by Mr Easton. This statement gave a completely different picture of his relationship with Mr Easton. He said this: "I enjoyed working with Karl Easton….We had a good working relationship. There were a few incidents, on about 5 or 6 occasions, when Karl telephoned me and blamed me for something. The next day he apologised." In his oral evidence Mr Walpole sought to explain the apparent discrepancy between the earlier documents and his statement of the 17th March 2015 by saying that the earlier documents were concerned only with the negative points in relation to Mr Easton because the positive points were not relevant in relation to his grievance or to his Employment Tribunal claim. I reject that explanation. It plainly was relevant to set out the full position vis-à-vis Mr Easton in the earlier documents. I am not in a position to determine why Mr Walpole has changed his account. However, I am quite satisfied that his various accounts are wholly inconsistent one with another. In consequence I shall pay no regard to the evidence given by Mr Walpole. In his closing submissions Mr Buchan argued that, because Mr Walpole was not cross-examined on his witness statement of the 17th March, the statement should be given considerable weight. I regret that I do not understand that submission. Mr Walpole was cross-examined on the basis of wholesale inconsistencies between his recent witness statement and earlier statements. It was not necessary for him to be cross-examined on the detail of the witness statement. His evidence was and is fundamentally flawed. The only material emanating from Mr Walpole which is of

any assistance is the bundle of photographs he took of the warehousing/storage area at the Romford store sometime in May 2010.

Lack of promotion

9. Pleaded as part of Mr Easton's case is the allegation that B & Q were negligent in relation to his promotion i.e. to the next level up from store manager. There is no doubt that Mr Easton's disappointment at not being promoted was a factor in his illness. On the 28th July 2010 Amanda Hollingsworth, a psychotherapist who undertook counselling of Mr Easton wrote: "….his job with B & Q has played a big part in his breakdown. He explained that his job was relentless and, although he says he felt valued by higher management, he was recently overlooked for promotion. He has been promised promotion before and I have the sense that this recent disappointment has contributed to feelings of helplessness." On the 15th December 2010 Dr Muthalif, having reviewed Mr Easton's case wrote a report his G.P. in which he said "(Mr Easton) is a high achiever by nature and was expecting a promotion in his job which unfortunately did not happen. As a result he went off sick in May 2010." In the joint report prepared for the purposes of the proceedings by Dr Andersson and Dr Latcham the agreed conclusion was that "the 'passing over' for promotion was one cause of Mr Easton's depression." Since this issue is a discrete topic, it is convenient to deal with the evidence relating to it first.

10. Mr Easton said that there were various points at which the question of promotion was mentioned or discussed. It was the cumulative effect of the various discussions which affected him. It is to be noted that the discussions spoken of by Mr Easton were against a background of consistently high appraisal scores in his formal appraisal process. He referred to three discussions with Mr McGloughlin:

- In June 2008 Mr McGloughlin, when offering him the job at Romford, said that he could look forward to that job being his last posting as a store/unit manager when he had put the Romford store on a stable footing.

- In December 2008 Mr McGloughlin visited the Romford store as part of a divisional team visit. At its conclusion he told Mr Easton that, if the store's results and performance continued at the same level, there would opportunity for promotion. "Promises were made" is how Mr Easton puts it.

- At some point in the later part of 2009 Mr Easton was standing in for the manager of the Thurrock store. Mr McGloughlin visited the store as part of a Board visit. At the conclusion of the visit Mr Easton asked him about promotion. Mr McGlaoghlin said "trust me, I will not let you down, leave it with me." Mr Easton said that the proper interpretation of that comment was that "a clear promise had been made that I would be promoted".

  Mr Easton said that Nigel Hughes also had spoken to him at the time that Mr Easton was acting as Mr Hughes's deputy to the effect that this would enhance his development for promotion. (Mr Hughes was not asked about this. His evidence in his witness statement was to the effect that Mr Easton's deputising for him would enhance his development but would not improve or guarantee promotion.)

The point at which he determined that he had been overlooked for promotion was early in 2010 when he spoke to a Mr France, the successor to Mr McGloughlin as divisional director. The conversation took place on the occasion of a meeting at head office which both men were attending. When Mr Easton raised the subject of his progression, Mr France said he did not know him and that he would have to prove himself to Mr France. In his witness statement Mr Easton said that "this came as a shock". In his mind one reason for Mr France's response was that "there never was any intention of advancing me in my career and that I was being exploited. At this point I felt very dejected".

11. Mr McGloughlin accepted that he had offered Mr Easton the job at the Romford store and that he had made the visits spoken of by Mr Easton. He agreed that he would have spoken to Mr Easton on those visits. He denied that he had any discussion about Mr Easton's promotion prospects in the terms described by Mr Easton. That was not because he had any specific recollection of the conversations. Rather, it was because he was the divisional director in charge of 80 stores and discussion about progression would be a matter for Mr Easton's line manager i.e. Mr Hughes. That would have come either in the appraisal process and/or in what B & Q called a talent development review ("TDR"). Mr McGloughlin was prepared to accept that he may well have offered some general praise along the lines of "well done". But he said that he would not have made remarks of the kind reported by Mr Easton. He agreed that he had not discussed Mr Easton's position with Mr France at the point of handover of the position of divisional director. Mr Easton was one of 80 store managers for whom he was responsible and the progression of those managers was a matter for the regional manager in the first instance.

12. The appraisal documents and the relevant TDR in relation to Mr Easton are in evidence. On the 26th February 2009 Mr Easton's full annual appraisal was carried out by his then regional manager, a Mr Clancy. The conclusion of the appraisal was that he had "further potential". Mr Easton was given an appraisal score of 6 which was described as follows: "Performs consistently well in current role. May make next level has displayed behaviours showing potential to progress". The TDR dates from January 2010. It identified Mr Easton as a high performer. There were two other managers of his grade within his region similarly described. On the 10th March 2010 Mr Hughes carried out Mr Easton's next full annual appraisal. This appraisal assessed Mr Easton as having "high potential". He had a score of 8 with this description: "Current role provides opportunity for growth/development – Will make next level if continue to deliver results/increase performance". Also within this appraisal was a short list of concerns arising from the last 12 months. One was whether the Romford store would be able to achieve the required increase in sales in the coming year because the previous year had set the bar high. The other was as follows: "Need to understand why I have been overlooked/not successful in the last 12 months for a next step opportunity and work towards achieving this goal".

13. What factual conclusion is to be drawn from this evidence? I am satisfied that during 2009 Mr Easton had persuaded himself that a promotion was on the cards. This is the only conclusion to be drawn from the concern he noted in his March 2010 appraisal. I am equally satisfied that nothing had been said or done whether by Mr McGloughlin or any other senior manager which could have led Mr Easton properly to reach that conclusion. I am quite certain that nothing had been said that conceivably could be

taken as "a clear promise" of promotion. The appraisal and TDR documents make it quite clear that Mr Easton was given explicit guidance as to the position by his regional manager. Even in March 2010 he was told that he "will make the next level **if continue to deliver results**" (my emphasis). The appraisal and TDR system adopted by B & Q kept Mr Easton fully informed as to the true position. I have not heard any evidence from Mr France. I am prepared to accept that Mr Easton's account of the conversation between the two men in February 2010 was the gist of that discussion. It is consistent with Mr McGloughlin's evidence that he did not discuss Mr Easton with Mr France on handover and that the divisional director would not be directly concerned with the promotion of a store manager.

14. The negligence now alleged in relation to the promotion issue is threefold, some of the allegations having been abandoned in the written closing submissions prepared by Mr Buchan. First, it is said that Mr McGloughlin failed in his duty to Mr Easton by failing to discuss the latter's promotion when he handed over to Mr France. Second, Mr Hughes "deliberately misrepresented" to Mr Easton that acting as Mr Hughes's number 2 would enhance his chances of promotion. Third, Mr France was in breach of his duty to Mr Easton by failing to heed Mr Easton's excellent work record, requiring Mr Easton to prove himself again and failing to discuss Mr Easton's promotion prospects.

15. There was no breach of duty involved in the failure by Mr McGloughlin and Mr France to discuss Mr Easton's promotion prospects. This allegation is fanciful. In his closing submissions Mr Buchan argues that the failure represents "a lack of support". Other than that Mr Buchan makes no attempt to explain how the duty arises, what its extent is and how properly it should have been performed. There was no duty to discuss. B & Q had a perfectly proper system of identifying those who were suitable for promotion. It was adopted fully in Mr Easton's case. It is not clear how Mr Hughes's misrepresentation could give rise to a cause of action – even if I were to have concluded that the relevant representation had been made. As a result of what Mr Hughes said (if he said it), Mr Easton acted as Mr Hughes's number 2. That caused no loss or damage. It is not suggested that Mr Hughes made any kind of promise of promotion. Such a suggestion would be bound to fail given the content of the TDR and the March 2010 appraisal. As for the allegation that Mr France was in breach of duty when he failed to have regard to Mr Easton's work record and he required Mr Easton to prove himself, this cannot mean that Mr France should have acted upon the work record to promote Mr Easton. What it does mean in terms of negligence is not clear to me. Nothing is said in Mr Buchan's written submission other than "it is a matter for the court whether (the allegations) constituted negligence". I am quite sure that they do not.

16. The fact that one cause of Mr Easton's illness was not the result of any breach of duty on the part of B & Q is not the end of the case. As Mr Buchan rightly submits it is not necessary for Mr Easton to show that the breach of duty was the whole cause of the illness. If work related stress which was the result of a breach of duty made a material contribution, that will be sufficient to found liability. However, the wholly skewed perception of Mr Easton in relation to promotion is a relevant consideration when assessing his evidence generally.

<u>Work related stress – the May 2010 breakdown</u>

17. The evidence available to me on the issue of work related stress included at least 300 pages of witness statement evidence. A precise page count is not possible because the bundle adopted an unfathomable numbering system. Whatever the numbering I have read each and every page. The live witness evidence occupied three full days of court time. I have been provided with a typed note of the evidence as prepared by Ms Tamar Burton, junior counsel for the Claimant. That has been very helpful and I am grateful to her. In fact, the factual boundaries were much narrower than often is the position in a case of this type. My rehearsal of the evidence will not have to be of the length that sometimes is required.

18. A significant body of evidence was called about Mr Easton's management style. Mr Griffiths said he was firm but fair and he said that he had no experience of Mr Easton shouting at anyone in the course of his work. Mr Blow said he was a very supportive manager who provided clear direction. Mr Russell said that Mr Easton was abrupt and aggressive, manipulative and overbearing. He regularly berated members of staff on the shop floor in an inappropriate manner. Tanya Lakey said that Mr Easton was an aggressive bully without scruples who was wont to shout and scream at members of staff in full view of customers. I also heard from Mark Walpole on this topic but, for the reasons already given, I pay no regard to his evidence. There is little independent material which supports one view of Mr Easton as a manager as opposed to the other. Staff engagement surveys generally were positive. However, Mr Russell said that the purpose of those surveys from his point of view was to provide a view in relation to the morale of the store and how the company is going. It was not a vehicle for employees to vent their spleen about individuals. I suspect that the reality was that Mr Easton sometimes was angry with members of his staff but that in general he was a good manager. Mr Russell agreed with the latter proposition. I do not need to reach a firm view on the issue of Mr Easton's management style. It is of little or no relevance to the determination of whether B & Q exposed Mr Easton to such stress in the workplace as to cause a foreseeable risk of injury.

19. As set out in the introduction to this judgment, by 2009 Mr Easton was a very experienced manager of large retail outlets. He had significant experience with Sainsbury's. He had worked with B & Q for around 5 years. He was well used to the pressures of managing a large store. He had coped well with those pressures. He had not experienced any undue stress relating to his work. His evidence was that this began to change in the latter part of 2009. Until that time B & Q had employed night staff to restock the store i.e. when the store was closed. No doubt for reasons of economy B & Q instituted a countrywide change to the way in which stores were to be restocked. Rather than night staff doing that work overnight, restocking (or replenishment as it was known) was to be carried out by staff working from 6 a.m. to 10 a.m. and from 8 p.m. to midnight. Since B & Q stores generally are open from 7 a.m. to 9 p.m. from Monday to Saturday, this meant that replenishment was going on whilst stores were open – though presumably at a time when the stores were less busy.

20. Mr Easton's evidence was that this change in system occurred at his Romford store beginning in September 2009. The process of removal of night staff began then with the final removal occurring in December 2009. His evidence was that he had said that the change was not suitable for introduction at Romford because the warehousing/storage space at the store was very small given the size of the store and the turnover of sales. He said that Mr Hughes had agreed with him but that the

change had gone ahead anyway. Mr Hughes's evidence on this point was to the contrary. He said that Mr Easton was keen to embrace any change put forward by senior management at B & Q. Resolution of this point is not of critical significance to the case overall because Mr Easton's evidence was that the removal of night staff initially did not cause particular problems. However, it may be a pointer to a more significant question, namely did Mr Easton tell Mr Hughes about later problems he was experiencing in the period leading up to his initial illness? I am satisfied that Mr Easton was happy to accept the change in the system. He was an experienced manager. He would have realised that the change was intended to improve B & Q's financial position. He was ambitious. He wanted to impress senior management with his ability to manage change. I am satisfied that, at the very least, he did not resist the removal of night staff from the Romford store.

21. Mr Easton's evidence was that the initial effects of the removal of night staff were not significant. He said that, at first, the stock level inputs were manageable. He said that the store did not get any many deliveries as previously and the level of stock was reduced so the available staff were able to restock the store. Although there were no longer any staff working overnight, some of the staff who had worked the night shift moved to the morning and evening replenishment teams and there was recruitment of new employees. Mr Easton said that in January 2010 his working day increased from 9 ½ hours to 10/11 hours due to the lack of night staff. In February 2010 his working day increased still further to 14 hours. He said that this was due to problems with stock and stock replenishment. He referred to a conference telephone call with Mr Hughes in about February 2010 in which he had said that he was working 14 hours a day and that he was knackered. The problems with stock continued until the point at which he suffered his illness.

22. The witnesses called by Mr Easton spoke of the removal of night staff. Mr Griffiths said that his working hours increased with the removal of night staff because he had to put stock away when this previously had been done by the night staff. Ms Dedman said that she had visited the Romford store after the removal of the night staff and had seen stock everywhere blocking the aisles. (It is relevant that Ms Dedman did not work at Romford and she was not involved in store management. I give little weight to her evidence on this topic.) Mr Blow's evidence was that the removal of night staff made the Romford store a difficult work environment because the workload in the day increased and stock piled up in the warehousing/storage areas.

23. Mr Russell (who was the manager in charge of stock at the Romford store) said that there were no particular difficulties as a result of the removal of the night staff. He said that the removal was a planned process and that staff were available morning and evening to do the work previously done by the night staff. He agreed that there came a time when more stock arrived in the store and there were some problems.

24. The evidence as a whole demonstrates that the change of system in relation to restocking the store created some problems. It was inevitable that requiring work to be done at the beginning and at the end of the day which previously had been done overnight would impose some pressures on stock management. The evidence of Mr Griffiths, Mr Blow and Mr Russell is to this effect. However, the stock records for the Romford store were produced in evidence covering the period from January 2008 to December 2010. Between December 2009 and March 2010 there was very little fluctuation in stock levels. The evidence does not support Mr Easton's contention

that the situation deteriorated as 2010 progressed as stock levels increased. I am satisfied that the effect of the removal of night staff was nothing like as dramatic as has been painted by Mr Easton. It did not cause a 40% increase in his working hours. It was a significant change in working practice but its introduction did not involve any breach of duty on the part of B & Q. Moreover, I am satisfied that Mr Easton did not complain about the effects of the removal of the night staff (as he now alleges them to have been). That was for the same reason as his initial agreement with the removal of those staff.

25. The other development which Mr Easton said caused him to be exposed to excessive stress in his work was the introduction of Trade Point in the Romford store. B & Q in 2010 were trying to attract tradesmen into their stores for the kind of business previously done by traditional builders' merchants and other trade outlets. They had a national programme for creating a special area in their stores for the exclusive use of tradesmen – painters and decorators, plasterers, electricians, general builders – with the kind of stock required by tradesmen in store. In Romford this required the construction of a mezzanine floor over part of the existing shop floor area used principally for the display of doors, shelves and bedroom units. This requirement was unusual. The configuration of many B & Q stores was such that Trade Point could be accommodated at ground floor level. However, Romford was not unique in the need for significant building work. Mr Hughes said that the same had been required on another store in his region (West Thurrock) and, of the 120 stores nationwide where Trade Point was introduced, 12 to 15 required construction of a mezzanine floor.

26. The introduction of Trade Point at the Romford store was a major event in terms of the management of the store. For a number of weeks part of the store was a building site. To ensure that the store was able to continue more or less normal trading in those circumstances was bound to be a challenge to the store manager. Because a significant part of the shop floor was out of action there were bound to be problems with stock management. It was wholly foreseeable that the introduction of Trade Point – particularly in the construction phase – would impose real pressure on the management of the store. It was not of itself a breach of duty to introduce Trade Point at the Romford store and that is not how the case is put on Mr Easton's behalf. Rather, it is said that the introduction of Trade Point at the time it was introduced and in the way it was introduced imposed excessive and foreseeable stress on Mr Easton.

27. Mr Easton's evidence is that he was aware that Trade Point was to be introduced at Romford as early as September 2009. That much is recorded in his half-yearly appraisal carried out at that time. He said that he was made aware of the intention to begin the relevant work in March 2010 and that he asked for it to be postponed because it would coincide with the influx of seasonal stock and the busiest period of trading for the store. His evidence was that he made this request to Mr Hughes but it was rejected. Mr Hughes disputed that evidence. He agreed that there was some flexibility in start dates for the introduction of Trade Point. The introduction at Romford had been put back and the process had been brought forward at a store in Beckton in East London. Mr Hughes said that Mr Easton was keen to have Trade Point at his store because of the trading opportunity it would provide and eager to show that he was capable of managing its introduction notwithstanding the pressures that it would bring to bear.

28. No other witness can speak to the issue of whether a request was made for the postponement of the introduction of Trade Point at the Romford store. Mr Herrett who was the B & Q director with overall responsibility for Trade Point explained that Romford was a complex store in relation to the introduction of Trade Point because of the size of the store (relatively small) and the turnover of sales (relatively high). He said that his aim was to introduce Trade Point at the stores with the highest sales first. Romford fitted that description.

29. I conclude that Mr Easton probably did express some misgivings to Mr Hughes about the timing of Trade Point vis-à-vis his store. I do not consider that those misgivings were expressed in such terms as to indicate that it ought to have put B & Q on notice of a significant risk of excessive stress being imposed on Mr Easton. In his witness statement he put it this way: "I complained to Nigel Hughes about the timing of the build…" When he was cross-examined he said that he had asked for the build to be delayed. Those statements are not wholly consistent. The reality is that Mr Easton realised what Trade Point would involve in terms of disruption to trading and in conversations with his regional manager – of which there were many since the two men spoke regularly and were on good terms – he spoke of the likely disruption. It did not go beyond that. It is significant that, in the document relating to the annual appraisal conducted on the 10th March 2010, there is no mention of Trade Point. As already noted the half yearly appraisal document dating back to September 2009 referred to Trade Point. Mr Easton added the reference in handwriting under the section headed "Planning". In advance of his annual appraisal Mr Easton prepared a document which included the section "Concerned". I have already referred to the content of that section. It makes no reference to Trade Point at all. In evidence Mr Easton accepted that another concern he had in relation to Trade Point (to which I shall turn shortly) should have been mentioned by him in the appraisal document. The same must apply to the timing of its introduction. Had the issue been more than the passing grumble which I find that it was, it would have been referred to by Mr Easton in the appraisal process.

30. I do not have any clear evidence as to when the construction process actually commenced. I was provided with a plan of the construction of the mezzanine floor dated 9th April 2010. It was described on its face as Revision F. It is difficult to see how the construction of the mezzanine could have commenced without a full plan available. I have no evidence as to the extent of the revision which led to Revision F. Mr Easton's evidence is that "the Trade Point conversion had commenced in March". I conclude that the preparatory work for the construction of the mezzanine floor began in the later part of March though the building work began in early April. It is clear that it had been completed - in the sense that the mezzanine floor was in situ – by the 2nd May 2010 because on that day Mr Herrett and Mr Easton went up onto the mezzanine to have a conversation.

31. What was the effect on Mr Easton (and his managers at Romford) during this period of around 4 to 5 weeks? Mr Easton said that it had a huge impact on him. The construction work was grossly disruptive. He had to monitor the building work on a daily basis. He said that April was the month during which seasonal products – mainly garden products – were delivered. Because of the reduced shop floor space, storage space was at a premium and the situation was exacerbated by the fact that two

of his senior staff were on long term leave. He was required to work 14 hours a day and 7 days a week.

32. Mr Griffiths's evidence on the issue of Trade Point was terse. He simply said that the stock situation was made worse by the advent of the construction of the mezzanine. He said that his weekly working hours increased from 50 to 70 but he elided the removal of night staff and the introduction of Trade Point as the reason for this even though the two factors temporally were months apart. Mr Blow's evidence was to almost identical effect. Mr Russell did not recall "any undue or unmanageable problems". Mr Russell was one of the senior managers said by Mr Easton to have been on long term leave at this time. Mr Russell's attendance record showed that he had been absent for 7 days - Wednesday 7th April to Thursday 15th April. Mr Russell confirmed that this was the total period he was absent. He said that otherwise he was at work and able to carry out his normal duties. That evidence undermines part of the picture painted by Mr Easton.

33. I am satisfied that the construction of the Trade Point mezzanine floor caused very considerable disruption at the Romford store. Mr Easton has exaggerated the effects of that disruption. He was not without the assistance of Mr Russell for the time he has asserted. The construction work itself was being carried out and overseen by a special team sent into the store so his need to monitor the work was limited. Equally, it did create real problems with storage and movement of stock. Running the store was a real challenge. At the end of April 2010 stock at the Romford store had to be taken to the Beckton store because of the lack of storage. The photographs produced by Mr Walpole show that the warehousing/storage areas were full. Having said that, Mr Herrett when shown the photographs said that this was what might be expected in a busy B & Q store – "typical" was the word he used – and he was not surprised by what was shown in the photographs.

34. Mr Easton said that he made it clear to Mr Hughes on a number of occasions that his situation was becoming impossible and that he needed assistance. In his evidence he spoke of conversations about his stock manager being unable to fulfil his duties. I do not accept that such conversations took place, not least because Mr Russell was able to work satisfactorily. The fact that those conversations did not occur does not of necessity mean that Mr Easton said nothing about the situation in his store. As I have said already Mr Hughes was a regular visitor to the store and the two men would have spoken when such visits occurred. I should say that scorn was poured on this proposition by Mr Buchan who put the case that Mr Hughes very rarely visited the Romford store. That scorn was ill-directed. Mr Hughes had only a dozen or so stores under his remit. Mr Easton was a close colleague. Romford was a busy store and geographically was a convenient store to visit when travelling to other stores in the region. As a regular visitor Mr Hughes would have been able to see for himself that the running of the store was disrupted by the construction work. I am satisfied that Mr Easton would have said that the position was challenging. He doubtless spoke of the difficulties with stock management. Equally, I am sure that, because of his desire to maintain his profile as a high performing manager, Mr Easton said nothing to Mr Hughes which could have suggested that he was "struggling and needed help" (as it is put in his witness statement). On the 28th April 2010 Mr Easton and Mr Hughes met for a review of his performance. It was only a short form review but it was an opportunity, had he chosen to take it, for Mr Easton to set out the position in his store

if it was as desperate as he now says that it was. Nothing was said in the review meeting itself. Mr Easton says that he spoke to Mr Hughes as they walked to the meeting and told Mr Hughes that he needed assistance. Mr Hughes is unable to recall any such conversation. I accept that Mr Easton in all probability spoke to Mr Hughes as they were walking together and that Mr Easton said something about stock management at the Romford store. Since it plainly was problematic it is highly likely that he would have mentioned it. I do not accept that anything said by Mr Easton was the "cry for help" which he has alleged. It is agreed that very shortly before his illness Mr Easton, with the agreement and assistance of Mr Hughes, sent stock to the Beckton store. That does not support a finding that Mr Easton had been asking for assistance for some time prior to that. Rather, it shows that, when asked, Mr Hughes accommodated Mr Easton's difficulties.

35. The other issue in relation to Trade Point raised by Mr Easton in his evidence concerned the replacement of his trade manager at Romford. In February 2010 a Mr Heggarty was transferred from his store and replaced by a lady named Fran McMillan. Ms McMillan had not been a trade manager previously. Mr Easton said that he had complained about the transfer of Mr Heggerty. I can dispose of this issue relatively briefly and without detailed reference to the evidence. First, the arrival of Ms McMillan is not the subject of any specifically pleaded breach of duty. Second, no-one has given any evidence that anything occurred in relation to the demands placed on Mr Easton which resulted from Ms McMillan being in post rather than Mr Heggerty. Third, Ms McMillan arrived in Romford well before the construction of the Trade Point mezzanine even began. No-one suggests that she would not have been fully capable of managing Trade Point once it was up and running. I am satisfied that there is nothing in this point which advances Mr Easton's case at all. It rather diminishes his case by being raised at all.

36. Mr Easton's last day at work before he was diagnosed with depression caused by work related stress was the 2nd May 2010. On that day Mr Herrett and a Mr Phillips (a director of B & Q from whom I did not hear evidence) made an unannounced visit to the Romford store. There is some dispute as to the detail of what happened at that visit. The dispute is of no significance. It is agreed that the visit took place, that the store was poorly set up with shelves empty, that Mr Easton and Mr Herrett went onto the mezzanine floor to have a private conversation, that Mr Easton broke down in tears once he was alone with Mr Herrett, that Mr Herrett asked what was going on (or words to that effect), that Mr Easton gave some kind of explanation about stock levels and the introduction of Trade Point and that, after a visit to the warehousing/storage area, Mr Herrett and his colleague left the store. Issue was taken with the adequacy of the response of Mr Herrett and his colleague. I do not consider it necessary to make any finding as to that – though I am satisfied that Mr Herrett did telephone Mr Hughes as soon as he left the store and that Mr Hughes contacted Mr Easton to tell him to go home. Whatever the adequacy of the response, it was of no relevance to the onset of Mr Easton's illness. By the 2nd May 2010 Mr Easton had developed the depression which forms the basis of his claim.

<u>The return to work – the further breakdown</u>

37. Mr Easton was away from work for a little under 5 months. He was treated with medication i.e. anti-depressants. He consulted a psychotherapist i.e. Amanda Hollingsworth to whom reference already has been made. B & Q deal with

occupational health issues through an independent healthcare company called Cigna. The Cigna case manager in respect of Mr Easton was someone named Liz Lennon. It is apparent that she reported regularly to B & Q although I have seen only two of her reports.

38. On the 9th September 2010 Liz Lennon reported in writing. The report was addressed to Nigel Hughes. Since Mr Hughes was on the verge of being sent to work on a project in China, he may not have seen it himself. However, the content of the report plainly was known to B & Q. It said that the dosage of Mr Easton's medication more recently had been reviewed and increased since which he slowly had begun to recover. It indicated that Mr Easton was receiving treatment from health professionals. A phased return to work was recommended. An example was given i.e. first week 1 day, second week 2 days and so on until full time working was resumed in the fifth week. The proposed date of the return to work was to be advised after a review in the following week. I have not seen any later report.

39. In due course it was decided that Mr Easton would begin his phased return to work at a B & Q store in Ipswich. Ipswich was close to Mr Easton's home address. It was a less busy store than Romford. On the 22nd September 2010 Mr Easton met Mr Black, the regional manager with responsibility for the Ipswich store. Mr Black knew Mr Easton although he had not had any managerial responsibility for him in the past. In addition Mr Black had been made aware of the circumstances of and reasons for Mr Easton's long absence from work. The phased return was agreed in the terms as set out in the example given in the report from Liz Lennon with the first day being in the week commencing 27th September 2010.

40. In his witness statement Mr Easton said that he did not feel mentally prepared for a return to work but he decided to do so because of his financial situation. That was not his oral evidence. He said at the hearing that he wanted to go back to work and that he felt ready to return. That is of some significance beyond the obvious inconsistency. Mr Black's evidence was that he understood that Mr Easton wanted to return to work in a post equivalent to the one he had held at Romford. That understanding would be difficult to maintain if Mr Easton's attitude was that he was unprepared for a return to work and that he was being driven by financial circumstances. The same would not apply if Mr Easton was ready and willing to resume work. I am satisfied that Mr Easton's oral evidence represents his subjective state of mind as it was on the 22nd September 2010. Mr Easton also gave oral evidence to the effect that he had said that he did not wish to work towards London in the future, the journey up the A12 being part of his decision. He gave no indication of when he said this or to whom. I heard no other evidence to suggest that Mr Easton gave this indication. This may have been what was in Mr Easton's mind. I am satisfied that he did not mention it to anyone else and certainly not to Mr Black. Had he done so, the events of the 7th October 2010 would not have occurred.

41. The 7th October 2010 was the fourth day of Mr Easton's return to work. If the phased return had gone to plan there would have been two further weeks of part time working before he returned to full time work. However, for reasons which now cannot be identified, a short term vacancy had arisen at the B & Q store in Belvedere in Kent. For whatever reason the store manager there was not going to be available to work in the store for 6 to 8 weeks and a temporary manager was needed. This vacancy had arisen at very short notice. Mr Black told me that there were other suitable candidates

available but that he considered that he ought to offer the position to Mr Easton. He felt that Mr Easton would have been aggrieved if the offer had not been made to him. He did not discuss the position with Cigna before he had the conversation. As I have said, the offer would not have been made if Mr Easton had made known that he did not wish to resume a journey down the A12. Belvedere is close to Dartford in Kent. From Mr Easton's home it would have involved a journey down the A12. Indeed, the obvious route would have taken him close to Romford before he took the M25 to the Dartford Crossing.

42. There is some dispute as to how the meeting on the 7th October 2010 unfolded although the dispute is around matters of emphasis rather than real substance. There is no dispute about the first matter raised by Mr Black. Mr Easton had raised the question of sick pay at some point. He had been paid his contractual entitlement in relation to his sick pay but he had requested an ex gratia extension of his sick pay on compassionate grounds. It had been decided by Mr France – Mr Easton's divisional director in relation to Romford – that no additional sick pay would be paid. I shall deal with the consequence of this decision straightaway. Of itself it was wholly in accordance with Mr Easton's contractual terms. I am satisfied that it could not found any breach of duty of care to Mr Easton. Indeed, it is not pleaded in those terms. Rather, it is said that the decision amounted to a breach of a promise. Mr Easton's witness statement is to the effect that he had spoken to Mr Hughes on the topic, that Mr Hughes initially had said that Mr France had refused to go beyond Mr Easton's contractual entitlement but that later Mr Hughes had told Mr Easton that his "full pay would be back dated" (whatever that may mean). This was not explored with Mr Easton doubtless because it was a relatively trivial matter in the context of the meeting with Mr Black. Mr Hughes made no reference to it in his witness statement and he was not cross-examined about it. The state of the evidence is unsatisfactory, therefore. Nonetheless, I am quite satisfied that no promise was ever made. Mr France clearly did not change his mind. Mr Hughes had no sensible reason to say that he had when he had not. It follows that the sick pay point gives rise to no breach of duty. I accept that Mr Easton was very disappointed by the decision. He doubtless felt aggrieved by it.

43. The main purpose of the meeting was to offer Mr Easton the chance to work at the Belvedere store for 6 to 8 weeks. Mr Easton's evidence was that Mr Black made the offer to which his immediate answer was no. Mr Black did not take no for an answer. In his witness statement Mr Easton put it thus: "…I was very much pressured and bullied by Craig Black into accepting…the Belvedere store. I was asked repeatedly whether I would like to accept the store and pushed continually to accept it". His oral evidence was in similar terms. Mr Easton said that he only was able to end the meeting by saying he would think about it and he needed to talk to his wife. He also said that he felt that B & Q were trying to force him to resign. Mr Black denied the suggestion that he had pressured or bullied Mr Easton. He said that he did no more than put the option in front of Mr Easton with the onus being on Mr Easton to say yes or no as he chose. There was no-one else at the meeting so there is no third party account of it. Ms Dedman's witness statement contained the following in relation to the offer: "Craig Black led me to believe that this was not a request that was being made by Jon France, it was an instruction". After she had been cross-examined on this passage, it was clear that she could not identify anything said by Mr Black which could have inculcated such a belief. This evidence is of no weight. The long term

absence log contained a note of the meeting as follows: "Craig had discussion with Karl reference covering Belvedere store for 6-8 weeks…Karl was not keen on the idea. He was asked to think about it and come back to Craig with a yes or no to doing this". The note is self-serving in that its content came from Mr Black. But it is a note made on the day of the meeting many months before Mr Black could have had any notion that there might be a dispute about what happened. The content of the note is more consistent with Mr Black's account of the meeting than that given by Mr Easton. More telling is the letter written by Mr Easton on the 9th October 2010. It asked for "clarification on a few points". Mr Easton asked what permanent position B & Q had in mind after Belvedere, what other re-introduction options were open and whether Mr Black was aware that Belvedere was almost double the distance from his home as compared to Romford. He asked for an early response. I leave to one side the inaccurate assertion as to the travelling distance from his home to Romford and Belvedere respectively. Romford was and is nearer to Mr Easton's home but the difference is not of the order suggested by Mr Easton. More important, this letter is entirely consistent with the account of the meeting as given by Mr Black. If Mr Easton were correct, he would not have written in these terms. I am satisfied that the meeting occurred in the manner described by Mr Black. In his closing submissions Mr Buchan invited me to draw an adverse inference from the manner in which Mr Black gave evidence. Leaving aside the fact that demeanour is a very poor guide to accuracy and reliability in a witness, I do not reach the same conclusions as Mr Buchan from the fact that Mr Black did not find giving evidence a comfortable experience and that he was careful when he answered questions.

44. Mr Easton went to his G.P. on the 8th October 2010 who re-certified him as unfit for work due to depression as a result of what Mr Easton told him. Why in those circumstances Mr Easton wrote as he did on the 9th October 2010 is not clear. In any event Mr Easton remained employed by B & Q but signed off as suffering with depression. There was a further attempted return to work in early 2012 but this failed. I do not need to consider the reasons for this or any of the events from October 2010 onwards. Although the pleaded claim rehearses the fact that Mr Easton underwent a grievance procedure and an appeal when he was unsuccessful in the initial procedure, the appeal also failing, no breach of duty is alleged in relation to those matters. I have seen and read a considerable body of documentation relating to Mr Easton's grievance and how it was conducted. There is no conceivable basis on which any breach of duty could be alleged. The fact that the conclusion was adverse to Mr Easton and that this added to his distress is not actionable. The grievance procedure material has been useful in one important respect. In the course of the appeal process Mr Hughes on the 22nd August 2011 gave a detailed account of the events surrounding Mr Easton's illness. In all important respects it was consistent with the evidence he gave before me. I note the criticisms made by Mr Buchan in his closing submissions. In my judgment the criticisms are of detail in relation to one aspect of his evidence. He was not taken in cross-examination to the matters now raised by Mr Buchan. They do not undermine the fundamental reliability of Mr Hughes as a witness. Contrary to the submission made by Mr Buchan I am satisfied that Mr Hughes was a reliable witness.

Risk assessment

45. A significant element of the case for Mr Easton, both as pleaded and as argued before me, was the lack of risk assessment in relation to stress. I shall come to how risk

assessment is or is not of relevance to the issues of foreseeability, breach of duty and causation later in this judgment. At this stage I shall consider the evidence that emerged on this topic.

46. Mr Easton agrees that, when he was employed, he was given a copy of the staff handbook. This contained a section entitled "Stress Management". The relevant part was in these terms: "If you are experiencing problems which are causing you to feel stressed at work or affecting your performance, you have a responsibility to talk to your Manager. If managers are not aware that there is a problem, they will not be able to help". Mr Easton's evidence about any other document he received in relation to stress management was confused and contradictory. In his witness statement dated 16th July 2014 at paragraphs 19 to 22 he stated that he had received a document entitled "Stress Management Policy" but that he had not had time to read it. In his witness statement served days prior to the start of the trial he stated that he had never seen the document. When cross-examined he initially accepted that his earlier witness statement was correct. Further, he said that he had seen another booklet referred to at the end of the document entitled "Managing Pressure and Stress – Employees' Booklet". Later in his cross-examination he retracted this evidence and said that he would "have to stick with" the content of his very recent statement. I am satisfied that Mr Easton was provided with the document "Stress Management Policy" at or near the start of his employment. I am satisfied also that he had time to read it though I accept that he may have chosen not to do so. I am not satisfied that he was given a copy of the employees' booklet. It may have been available on the B & Q staff intranet but that was not something to which Mr Easton referred.

47. The Policy document identified that stress could lead to mental illness such as depression. It set out the responsibility of employees in relation to stress in precisely the same terms as the staff handbook. It dealt with the responsibility of line managers for controlling workplace stress. Mr Easton was the line manager for those working at the Romford store whilst his line manager was Nigel Hughes. The various factors relevant to stress were itemised under the heading "Line managers". These included the need to schedule work sensibly (which implicitly included the hours worked) and to address outward signs of stress such as changes in a person's behaviour and/or irritability.

48. The senior managers and directors of B & Q who gave evidence were asked about risk assessment in relation to stress. Mr Herrett (who had overall responsibility for the introduction of Trade Point across B & Q nationwide) accepted that no assessment of the risk of stress to employees arising from the disruption involved in Trade Point was carried out whether nationally or in individual stores. Mr McGloughlin agreed that risk assessments in relation to stress were not carried out by B & Q. He said that he would not have expected any. Both he and Mr Hughes confirmed that B & Q did not run training courses in stress awareness. Mr Hughes said that he was familiar with the Stress Management Policy and the booklets additional to that policy. That was the basis on which he monitored stress whether in respect of Mr Easton or any other employee for whom he had responsibility.

49. I was provided with a considerable body of advisory and guidance material produced by the HSE on various dates prior to 2010 in relation to work related stress and appropriate risk assessment. The documents were detailed but the six key risk factors were identified as: the **demands** of the job; **control** over the work; **support** received

from managers and colleagues; **relationships** at work; **role** in the organisation; **change** and how it is managed. The guidance on assessment of risk in respect of stress essentially was as follows:

- Identify the particular stress risk factors applicable to the relevant workplace.
- Decide who might be harmed and how.
- Evaluate the risks.
- Develop and implement action plans to deal with the risks found.
- Monitor and review the actions plans as they are operated.

The law

50. The leading authority on claims by employees for damages in respect of psychiatric injury caused by stress in the workplace remains Hatton v Sutherland [2002] ICR 613. The judgment of the court was given by Hale LJ (as she then was) and the principles to be applied were set out at paragraph 43 of the judgment. I set out that paragraph in full.

"(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 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."

51. This set of principles has been cited and applied in many cases since 2002. It is not disputed that they remain an accurate summary of the proper approach. Mr Buchan does point out that in the years since 2002 the concept of risk assessment has been commonplace so as to require some amelioration of the rigour of the principles in Hatton. He also argues that statutory duties now apply which were not applicable when Hatton was decided. I shall come on to the statutory regulations shortly.

52. One case in which Hatton was discussed was MacLennan v Hartford Europe [2012] EWHC 346 (QB), a judgment of Mr Justice Hickinbottom. The facts of the case are of no consequence. However, Mr Justice Hickinbottom at paragraphs 14 to 22 conducted a very helpful discussion of some of the issues which can arise in cases of stress. I set out those paragraphs.

"Given the potentially crucial nature of foreseeability in this claim, it may be helpful to highlight some aspects of Hale LJ's propositions relating to that issue.

First, it is insufficient for a claimant to show that his employer knew or ought to have known that he had too much work to do, or even to show that he was vulnerable to stress as a result of overwork. To succeed, he must show that his employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm in terms of a psychiatric or other medical condition (see, e.g., Bonser v UK Coal Mining Limited at [27] per Ward LJ, and at [30] per Simon Brown LJ).

Second, even then it is insufficient merely to show that there was a known risk of some psychiatric or other injury in the future. The claimant must show that the employer knew or ought to have known that, as a result of stress at work, there was a risk that he would suffer harm of the kind he in fact suffered (Hatton at [43(2)], quoted above). Consequently, where (as in Mrs MacLennan's case), she suffered a breakdown, it is insufficient for the employer to have actual or constructive knowledge that there was a risk that the employee might at some stage in the future suffer some other medical condition as a result of his work if the nature of the work continued unabated: the employer must have knowledge of an imminent risk of the sort of collapse of health that in fact occurred (Bonser at [25]; Pratley v Surrey County Council [2003] EWCA Civ 1076 at [23], [25] and [31]; and Hartman v South Essex NHS Trust [2005] EWCA Civ 6 at [11]-[12]).

Third, although most employees will have difficulties with the amount or nature of their work from time-to-time, very few are at risk of psychiatric illness as a result. An employer is entitled to assume that an employee can withstand the normal pressures of the job unless (i) the job is such that employees are known to be at particular risk if injury (e.g. if other employees doing the same or similar work have become ill as a result of the work), or (ii) the employer knows or ought to know that a particular employee is especially vulnerable to stress-induced illness because, for example, that employee has already had a psychiatric episode as a result of stress at work about which the employer is or ought to be aware, or he manifests clear signs to his employer of some impending harm to health prior to the illness in fact suffered (Hatton at [29]; and Bonser at [31]). Either of those may trigger a duty on the

employer to consider taking steps to protect the health of the employee; although, because each employee will have a different ability to deal with stressful situations, whilst the nature of the work will always be relevant, usually the actual or constructive knowledge of the employer as to a particular employee's vulnerability to stress-related illness is of greater importance. Hence, Hale LJ's comment in proposition (3) above, that: "Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee". It is often said that this is because each employee will have a different ability to "cope" with stressful situations.

However, care is needed here. Like "stress" (see paragraphs 23-5 below), "cope" has a variety of meanings in an employment context. At large, its meaning is "to deal successfully" with something; but, in a work context, there are differing parameters for "success". Where an employee has too much to do, the usual consequence is that his performance of that work suffers: some of the work does not get done, or there is a reduction in the quality of the work that is done. In performance terms, such an employee is not "coping" with his work. Most employees will on occasions be "overworked", and will have problems in "coping" with their work, in this sense. However, that does not mean that work necessarily poses a threat to that person's health. Indeed, even in those circumstances, it will rarely do so. Doing your work whilst maintaining your function and health is to use another legitimate marker of "success" for the purposes of the definition of "coping", but a marker that is quite different and distinct. When used in an employment context, "cope" may have either meaning: but it is often used in reference to performance, rather than health.

Fourth, an employer has a duty to act only when "the indications [are] plain enough for any reasonable employer to realise that he should do something about it" (Hatton at [31]). Of course, for all sorts of reasons, it is understandable that an employee may not wish to reveal to his employer that he is having difficulties with his job, or may not wish to reveal the full extent of his difficulties. As Hale LJ said in Hatton (at [15]):

> "Some things are no-one's fault. No-one can blame an employee who tries to soldier on despite his own desperate fears that he cannot cope, perhaps especially where those fears are groundless. No-one can blame an employee for being reluctant to give clear warnings to his employer of the stress he is feeling. His very job, let alone his credibility or hopes of promotion, may be at risk. Few would blame an employee for continuing or returning to work despite the warnings of his doctor that he should give it up. There are many reasons why the job may be precious to him."

However, where an employee keeps his difficulties, and any resulting stress and/or medical condition, from his employer, Hale LJ continued:

> "… it may be difficult in those circumstances to blame the employer for failing to recognise the problem and what might be done to solve it."

Although of course there may be circumstances in which there are other signs of impending harm to health, sufficiently clear to an employer to trigger his duty to take steps, where an employee does not, directly or through a doctor, inform his employer that work is having a detrimental effect on his health, or at least risks doing so, then it may be difficult for him to prove that the employer ought to have foreseen a risk to his health as a result of his work (see, e.g., Barber at [6], per Lord Scott).

That is especially so because an employer has no general obligation to make searching or intrusive enquiries, and may take at face value what an employee tells him. In particular:

> "An employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself to be fit to return to work which he was doing before. The employer is usually entitled to take that at face value unless he has good reasons to think to the contrary." (Hatton at [30]).

The foreseeability threshold in claims such as this is therefore high (see, e.g., Bonser at [28] per Ward LJ, where it is described as such); and it may prove a formidable obstacle on the facts of a particular case (Garrett v The London Borough of Camden [2001] EWCA Civ 395 at [62]-[63] per Simon Brown LJ).

53. The principle statutory regulation on which Mr Buchan relies is Regulation 3(1) and 3(3) of the Management of Health and Safety at Work Regulations 1999 which read as follows:

3.-(1) Every employer shall make a suitable and sufficient assessment of-

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.

……

(3) Any assessment such as is referred to in paragraph (1) or (2) shall be reviewed by the employer or self-employed person who made it if-

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the matters to which it relates; and where as a result of any such review changes to an assessment are required, the employer or self-employed person concerned shall make them.

54. Mr Buchan also invites me to consider the Working Time Regulations 1998 and the various amendments thereto by which the Working Time Directive forms part of our law. My understanding is that he accepts that these regulations give rise to no civil remedy. He invites me to take them into account when assessing the allegation of breach of duty at paragraph 107(q) of the pleaded case i.e. permitting Mr Easton to work in excess of 48 hours per week from September 2009 onwards.

Conclusions

55. Leaving aside issues relating to risk assessment Mr Easton's claim on a proper application of the principles adumbrated in Hatton is bound to fail at the first hurdle - foreseeability - in respect of his first breakdown. Mr Easton had spent his 10 year managerial career in charge of large retail outlets. He had no history at all of any psychiatric or psychological problems. Nothing about him gave anyone any clue that he might succumb to a psychiatric illness. All of those who knew him well within B & Q had no idea that he might do so. It came as a surprise to Ms Dedman even though (on her evidence) she was well aware of the problems he was experiencing at work and as a Human Resources specialist she was someone with an appreciation of the issues relating to stress at work. I do not propose to relate in detail the principles in Hatton as explored in MacLennan to the facts of this case. It is not necessary to do so. It is quite clear that the foreseeability threshold in respect of the first breakdown cannot begin to be surmounted on any view of the evidence. Whilst it is not of immediate significance to the issue of foreseeability of psychiatric illness being suffered by Mr Easton on an individual consideration of his circumstances, it is of note than Mr Hughes with his 10 or more years' experience of regional management with B & Q was unaware of any other store manager developing work related stress and consequent illness save for one manager whose illness was more related to personal issues that his work. Thus, not only was there nothing about Mr Easton which put anyone on notice that he might suffer psychiatric illness but also there was nothing about store managers in general giving rise to foresight of such a risk.

56. As to the relapse suffered by Mr Easton it is true that B & Q now knew that he had suffered a psychiatric illness. The fact that he was still taking medication is hardly determinative as to how his future employment should have been handled. There are many people who hold down demanding jobs who still require medication. But B & Q were on notice that Mr Easton was vulnerable. Had I accepted his account of the meeting he had with Mr Black, there might have been a basis for concluding that further psychiatric illness was a foreseeable consequence of dealing with him in that way and that Mr Black was in breach of his duty of care to Mr Easton. I have taken a different view of the evidence. The fact that there was a planned return to work and that Mr Black's offer did not accord with that plan is not sufficient to mean that making the offer was a breach of the duty of care owed to Mr Easton. The approach taken by Mr Black was a reasonable one. Mr Buchan argues to the contrary. He submits that the planned return to work schedule should not have been altered without consultation with Cigna and B & Q's HR department and that it was unprofessional to make the offer of the post at Belvedere when Mr Easton was vulnerable. If Mr Black

had pressured and bullied Mr Easton and/or if the offer had been made on the basis that it was the only alternative, I would have agreed with Mr Buchan's argument. That was not the position. Mr Easton on his own account was ready to return to work and he wanted to return to work. He was an experienced manager. Notwithstanding his recent illness, Mr Black was entitled to act on the basis that Mr Easton would be able to assess whether he wished to take up a particular opportunity. The evidence of Dr Latcham is that, assuming Mr Black's account of the meeting to be correct, the offer made to Mr Easton was "appropriate".

57. It follows that I am satisfied that the events of the 7th October 2010 did not amount to a breach of duty. That disposes of that part of Mr Easton's claim since risk assessment in the ordinary sense had no part to play at that stage. Even if there were a breach of duty on the basis of Mr Black's account the evidence of Dr Latcham is that the meeting of the 7th October 2010 had no significant effect on Mr Easton's illness. If that is right, the meeting was of no causative effect. The joint report refers to a worsening of depression "should Mr Easton's account on this matter be preferred". As I have made clear, I do not prefer his account.

58. Issues of breach of duty and causation only arise if it is accepted that the psychiatric illness following the events of the 7th October 2010 was foreseeable. Mr Buchan argues that it is simply not open for me to find that the relapse was unforeseeable. In the sense that Mr Easton was at risk of psychiatric illness, there was a foreseeable risk. But the issue of foreseeability goes further than that. The employer must know or the employer ought to have known that as a result of stress at work there was a risk of psychiatric illness. In relation to the relapse that would require foresight that offering Mr Easton the temporary post at Belvedere would cause a recurrence of the psychiatric illness. The citation from paragraph 30 of Hatton does not mean that, if the employer is aware of some vulnerability, the employer inevitably will be liable for any psychiatric illness then suffered by the employee due to some act of the employer. I have concluded that B & Q were not in breach of duty by reason of the approach taken by Mr Black so my conclusion on foreseeability is not decisive. In fact, I consider that Mr Black's approach did not give rise to a risk of psychiatric injury of which he knew or ought to have known.

59. What then of the issue of risk assessment? Given the well-established principle that foresight of an imminent risk of psychiatric illness being suffered by the individual concerned is necessary to found liability, how do the principles of generic risk assessment apply to this type of case? If there has been a breach of Regulation 3 of the 1999 Regulations, that does not remove the need for proof that the particular harm suffered by Mr Easton was foreseeable. Mr Buchan put forward the argument that a proven breach of the Regulations would dispense with the need for such proof without success in Mullen v Accenture Services [2010] EWHC 2336 (QB). He does not put it forward in these proceedings. Rather, he argued that on the facts of this case a proper risk assessment approach on the part of B & Q would have provided them with the requisite knowledge.

60. He relies on the approach taken by H.H. Judge Cotter Q.C. (sitting as a deputy High Court Judge) in the case of Bailey v Devon Partnership NHS Trust (2014 – unreported). In the course of a very lengthy judgment the judge in that case rehearsed the argument as put to him – as it happens by Mr Buchan.

"Mr Buchan argued that a risk assessment should have been undertaken and should have led to a recognition that the consultants generally were at risk of stress related illness. Given the existence of a specific policy relating to stress that should then have led to its full implementation including as a first step the filling in of the stress assessment tool. That would then have provided a focussed assessment of the stress experienced by the Claimant. So given the current appreciation of the risks posed by stress it did not require the indications of impending harm to the Claimant's health arising from stress at work to be "plain enough" before an individual assessment became necessary. It became necessary through a different route. Understanding this to be Mr Buchan's argument: I accept it."

61. Judge Cotter Q.C. in taking that view did not ignore what was said in Hatton and in subsequent cases. Having discussed the principles in Hatton at length he said this:

"However stress cases are highly fact specific and it may be in certain circumstances appreciation of a general risk of psychiatric injury to a group of employees following a risk assessment may require action which would have prevented the future illness of an individual who was not at "short-term" risk."

That approach coupled with the argument as presented to the judge by Mr Buchan involves no derogation from the principles in Hatton. Rather, it builds on the statutory requirement to undertake risk assessments. Where such a risk assessment showed a general risk of psychiatric injury to the relevant group of employees, it would then require individuals to complete a stress assessment tool either at appropriate intervals or when the individual was aware of signs of stress or both. By this route the employer who failed to take any steps in relation to risk assessment could be fixed with constructive knowledge of imminent psychiatric illness.

62. Application of that approach does not assist Mr Easton's case. I am satisfied that, had a general risk assessment been conducted, no general risk of psychiatric injury would have been uncovered. The working environment of B & Q was pressured but no more than many other similar organisations. As Mr Hughes commented when he was being asked about the pressures on a store manager working for B & Q at the peak season, they were relatively modest compared to the pressures he had faced in the same role when working for Sainsbury's in the period leading up to Christmas. As already noted there was simply no history in B & Q of store managers suffering from psychiatric illness. Until the early months of 2010 Mr Easton himself would have abjured any suggestion of being under undue stress, never mind being at risk of psychiatric illness.

63. Even if proper risk assessment would have led to Mr Easton using an individual stress assessment tool, it must be asked when he would have been prompted to use it. His evidence varied as to when he began to feel under stress. I conclude that it was in the later part of March 2010 i.e. the point at which Trade Point implementation began when stress became noticeable. What then would he have observed and noted? It is far from clear that he would have noted anything at all. The staff handbook of which he was aware required him to talk to his manager (Mr Hughes) if he felt stressed at work. As I have found, he did not approach Mr Hughes in those terms. As Mr Hughes said Mr Easton simply made what were termed as "normal complaints around day to day stuff". I have set out why Mr Easton took that approach. I am satisfied that the same reasoning would have applied to a stress assessment tool.

64. In the B & Q document entitled "Managing Pressure and Stress – Employees' Booklet" there was a section headed "Identifying Signs of Stress in Yourself". There were then four sub-headings dealing with physical, psychological, emotional and behavioural signs. Each sub-heading detailed 10 or 12 different signs. This part of the document in effect was an individual risk assessment tool. Mr Easton made a witness statement four days before the commencement of the trial dealing with that document. He asserted that prior to his illness he had suffered from nine of the physical signs, all 11 psychological signs, all 12 emotional signs and 11 of the behavioural signs. He said that, had he had this tool to hand, he would have realised that he was suffering from symptoms of stress. The signs outlined in the booklet were specific. They were easily identifiable without any medical training or specialist knowledge. Had Mr Easton truly been suffering from these symptoms, he would have been able to describe them. In his witness statement of the 16th December 2011 he set out what he identified as the symptoms of stress in these terms: "I was very tired, I was not 'being myself', I was unapproachable and short with people. This affected everything I did, both at home and work. I was also very emotional when on my own." That description falls far short of the matters set out in the booklet. On balance I am satisfied that Mr Easton was not experiencing the signs as set out in the booklet until the point at which he was suffering from a psychiatric illness. By that time it would have been too late for anything to have been done by his employers to remedy the position.

65. For all of these reasons I conclude that on the facts of this case proper risk assessment would have had no effect on the outcome. That being so Mr Easton has failed to establish that his psychiatric illness was foreseeable and, in any event, that there was any breach of duty on the part of B & Q. It follows that his claim for damages must fail.

Quantum

66. Had the claim succeeded both in relation to the initial illness and in respect of the relapse I consider that general damages for pain, suffering and loss of amenity would have been in the region of £17,500. The case falls at the lower end of the "Moderately severe" bracket of psychiatric damage as set out in the Judicial College guidelines. I do not proposed to review the medical evidence at length but it shows that Mr Easton suffered from significant depression for approximately 2 ½ years with some symptoms continuing thereafter and with a risk of recurrence of depressive illness.

67. The medical evidence does not support a continuing loss of earnings based on a residual earning capacity of £28,000. That is barely a quarter of Mr Easton's pre-illness earnings. The agreed medical evidence is that Mr Easton now is capable of working in any capacity for which he is trained. I have not heard sufficient evidence to determine what Mr Easton's true residual earning capacity is. All I can say is that it must be significantly higher than the figure put forward in his schedule of loss.

I accept that an award for loss of congenial employment may be made in cases where the employment at first blush is not of itself attractive. I have myself made such an award recently to a claimant who no longer could work as a skilled tradesman. However, it is not appropriate where the claimant as here potentially will be able to return to an occupation similar to that which he found congenial.