Neutral Citation No. [2005] IEHC 130

THE HIGH COURT

[2002 No. 14428 P]

BETWEEN

MICHAEL MAHER

PLAINTIFF

AND

JABIL GLOBAL SERVICES LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered 12th May, 2005.

1. In these proceedings the plaintiff claims damages for negligence and breach of duty giving rise to personal injuries. However the circumstances in which the claim arises are somewhat unusual. The plaintiff claims that as a result of certain treatment to which he was subjected in the course of his employment with the defendant company he has suffered significant psychological harm. The actions of which he complains may loosely be said to come within the rubric of "stress, harassment and bullying in the workplace". That such a cause of action may be maintained is clear from a number of judgments of this court to which I will return in due course. Many of the primary facts are not in dispute although in a number of key areas there are significant differences in the evidence tendered on the one hand by and on behalf of the plaintiff and on the other hand by and on behalf of the defendants. It is necessary to commence by reviewing the factual background to this dispute.

The Facts

2. The plaintiff was employed by the defendant as a supervisor in the early months of 2001. After an initial period the plaintiff was allocated to a part of the defendants activities which involved a production line which worked on IT equipment from DELL. He acted as a supervisor until the middle months of 2001. It is common case that the DELL programme grew very rapidly during the course of 2001. A chart was proved in evidence from which it is clear that the total numbers working in that area grew from 25 in January 2001 to 96 in December 2001. It is common case that the DELL programme was, in the words of a number of the witnesses on both sides, "ramping up" at all material times. This meant that a significantly greater volume of equipment was going through the process.

3. It is also common case that the DELL aspect of the defendant company's operation was at all material times conducted on the basis of two separate shifts. Each shift worked for a two week period Monday to Wednesday on a 12 hour day and then moved for a further two week period with a similar day worked Thursday to Saturday. Therefore once a month the employees would enjoy a natural break of seven consecutive days but would equally, on a once a month basis, have a period of seven days in which they worked six 12 hour shifts. In the DELL programme during the early and middle part of 2001 each shift had a supervisor both of whom reported to an overall manager. That manager worked a "normal" working day and was not, therefore, allocated to either shift. While there was some little difference between the parties on this issue I am also satisfied that at all material times there was a second supervisor on each shift termed as "a debug" supervisor whose duties involved overseeing the "debug" or problem solving part of the process. The events which give rise to these proceedings commence in July and August 2001 when the defendants put in place a new structure. The principal relevant change was that a shift manager was appointed to each shift. In July the plaintiff was appointed to one such role which amounted to a promotion. The appointment became effective in August. It should also be noted that the plaintiff was, at that stage, still in his initial probationary period which also expired in August. There was no separate probationary period in respect of his promoted position as shift manager. There remained in place in respect of each shift a supervisor together with the debug supervisor.

Matters in controversy

4. After this time there are issues of fact in controversy between the parties. What is not in controversy, however, is that having taken up the position of shift manager the plaintiff began to suffer from what has now been diagnosed as stress (although the initial diagnosis suggested the possibility of heart trouble). This led to the plaintiff being out sick from the 19th October until the end of the year. He then returned to work, in early January, having had consultations with representatives of the defendants and having undergone a medical assessment on behalf of the defendants. On his return the plaintiff was assigned to different work on what was known as the "Nortel Shelf". He continued on the Nortel Shelf until approximately the 12th of March (subject to a number of days absence during that period) when he went out on what might be termed relatively permanent sick leave. This lasted until he gave notice of the termination of his employment effective in mid October 2002. In simple terms the principal areas of controversy between the parties concern the circumstances which led to the plaintiff's initial stress in the period leading up to mid October 2001 and the further circumstances that led to him going out sick in March 2002 with particular reference to the way in which he was treated by management on and after his return in early January. While there obviously are some connections between the events in those two periods the claims made in respect of them and the key disputed facts material to a consideration of those claims are significantly different and it is, therefore, convenient to treat them largely separately. For convenience I will refer to the earlier period as the "DELL Manager" period and the latter period as the "Nortel Shelf" period.

The Plaintiff's claims

5. The plaintiff's contention in respect of the DELL manager period was that the amount of work which he was required to do and in particular the pressure under which he was placed by management to achieve targets which he described as unrealistic gave rise to his stress and occurred in circumstances where his employers knew or ought to have known that such harm was a likely consequence.

6. The claim made in respect of the Nortel shelf period is, to some extent, the direct opposite. It is contended that the defendant company in effect gave the plaintiff a "non job" which exposed him to humiliation amongst his fellow workers to whom it would be obvious, on his case, that he had been, in practice, demoted.

7. It is necessary to consider each of those periods in turn.

The Dell Manager Period

8. The plaintiff's complaint is that during this period he was put under unacceptable pressure by management. In evidence in answer to Q. 81 on Friday 15th April, 2005 the plaintiff said the following:-

> "The ramp up had increased, the pressure was on. We had the General Manager, Liam O'Halloran, down every half an hour, checking, checking targets, asking. We also had Maria Madden down. They were very intimidating, in your face kind of thing, never let you alone to get on with it. They were coming down, whats going on, what have you got, what numbers have got, how are we doing, whats happening. Like Liam would say you know what the target is".

9. The remainder of the plaintiff's evidence in respect of this period was of a similar nature. He also called some additional witnesses who gave differing accounts, Ms. Orla Whelan gave evidence that there was some difficulty in meeting the targets. Similarly Mr. James Dempsey gave evidence that "there was a lot of pressure on because there was no way you are going to get that". He was referring to the targets. On the other hand Ms. Colette Dolan, also a plaintiff's witness, described (at Q. 653 on 21st April, 2005) the pressure in the following terms:-

> "There was pressure but it was never extreme, we could cope with it. We worked as team in the area, there were no individuals, we pulled together. Everybody in the area knew what had to be done and we helped each other out".

10. The defendants witnesses accepted that there would have been pressure in respect of DELL at the time in question. However it was strenuously denied that any of the targets set were unreasonable or unrealistic or that the attention of management to ensuring that those targets were met, and in relation to seeking explanations when they were not, was ever inappropriate.

11. It must also be noted that under cross examination the plaintiff conceded that his initial contention (referred to above) that Mr. O'Halloran (who was vice president of European Operations for the defendant company was the managing director and senior manager for the plant at Clongshaugh) was down on the shop floor on a half hourly basis was exaggerated. Mr. O'Halloran gave evidence (supported by other defence witnesses) that he would attend approximately three times a day and only then when he was not out of the country dealing with other business of the defendants in relation to other plants which they operated throughout Europe. By the end of his evidence the plaintiff had accepted that Mr. O'Halloran would have been down no more than six times in the course of a typical 12 hour shift and agreed that there would have been some days when he would not have been down at all. In all the circumstances I cannot conclude that there was any excessive or unreasonable management pressure.

12. It should also be noted that there was no expert evidence from which it might be concluded that the volume of through put targeted in respect of the DELL area was greater than might be reasonably expected for a work force of the training of that present at Clonshaugh and with the available equipment. The Defendants evidence was that targets only were increased as the workforce and equipment became sufficient to meet them. It does not seem to me that it can be contended that an employer is in breach of a duty of care to employees either individually or collectively by setting targets which are ambitious provided that such targets are not such as would make them unachievable having regard to all of the conditions prevalent in the workplace on the occasion in question. I cannot conclude on the evidence that the targets were excessive in that way. Nor can I conclude that the actions of senior management in keeping a reasonably close eye on how a new and important part of the company's business was coping with a "ramping up" of its activities is anything other than that which would be expected of a competent management. There may be occasions where it would be possible for a court to come to its own assessment as to whether the level of work being asked of an employee was such as might expose a reasonable or typical employee to an unreasonable level of stress. However it seems to me there are also areas where it would be most difficult for a court to reach such a conclusion without expert evidence that targets or other demands and the like were unreasonable. I have come to the view that this case falls into the latter category. The fact that a small number of individual employees have described the targets as extremely difficult but that many other employees were happy to describe them in terms that might be reasonably be described as challenging but fair demonstrates how difficult it would be for a court to reach a conclusion that the targets were so severe as to render the employer in breach of duty without the aid of expert evidence.

13. In assessing this aspect of the plaintiff's case I have also taken into account the evidence of Ms. Noeleen O'Brien who acted as the shift supervisor working immediately under the plaintiff after the plaintiff's promotion. She is the person best able to assess the degree of pressure under which the shift was working. It is also of some relevance that she is no longer employed by the company for reasons wholly immaterial to these proceedings. When asked at Q. 98 on the 26th April, 2005 as to whether the level of pressure was unacceptable she replied "absolutely not". She confirmed that she was able to cope with same. It is instructive to note that after the plaintiff went on sick leave in mid October 2001 Ms. O'Brien was on her own as supervisor for about one month in the area with some assistance from Maria Madden who was a more senior manager. There was therefore no shift manager for that period. I am also satisfied that there was no justification for the plaintiff's contention that Ms. O'Brien's pregnancy placed him under additional pressure.

14. I have also taken into account the case as originally made by the plaintiff to the effect that the number of supervisors working to the shift manager increased from one (at the time when he was working as manager) to three by early January 2000 when he returned to work on the Nortel Shelf. Insofar as there were three supervisors by that stage one was the so called debug supervisor who had been there at all times. Thus the increase in the number of supervisors was from two to three rather than one to three. Having regard to the level of the increase in the number of employees involved in the DELL operation from approximately 70 in the August/September period to almost 100 in December there does not seem to me to be any reason to doubt the defendant's evidence that the increased number of supervisors simply reflected a greater volume of business and was not as a result of a realisation on the part of management that there had been insufficient supervisors at the time when the plaintiff was acting as shift manager.

The First Sick Leave Period

15. As indicated earlier in the course of this judgment the plaintiff began to suffer from symptoms of stress quite soon after his appointment as manager. It is not suggested that he brought any of his concerns to the attention of management at this stage. Matters appear to have come to a head in October when, as a result of a consultation with his own general practitioner, he was referred to a consultant cardiologist. The plaintiff was seen on 7th November, 2001 and gave a history of having been troubled by recurrent episodes of central chest pain over the preceding six weeks and which seemed to have been related to rest rather than exertion and were worse with inspiration. Dr. Joseph Galvin, the Consultant Cardiologist, concluded that the plaintiff had chest pain which was atypical for cardiac aetiology. Those findings were reported back to Dr. Frank Fine, the plaintiff's general practitioner, who had referred the plaintiff to Dr. Galvin in the first place. As a result of those findings Dr. Fine reassessed his initial concerns and diagnosed that the plaintiff was suffering from stress. It is common case that as soon as the plaintiff received what he described as the all clear from Dr. Galvin he discussed with his employer the possibility of returning to work. The employer asked its own doctor (Dr. Dermot Halpin) to review the matter. Dr. Halpin had seen the plaintiff in the early part of 2001 for a pre employment examination. However he saw him again in early January 2002 on the basis of a referral from Ms. Aileen O'Toole the Human Resources Manager of the defendant company. Ms. O'Toole had explained to Dr. Halpin the history of chest pain and blood pressure over the previous months which had afflicted the plaintiff and had sought Dr. Halpin's opinion as to whether the plaintiff was fit for work. Dr. Halpin gave evidence that he formed the view that the plaintiff should not return to the precise employment which had led to him feeling stressed in the first place. He recommended that the plaintiff should talk to Ms. O'Toole concerning finding another position within the company that would not cause stress. He also suggested counselling. He recommended counselling because, in his view, the plaintiff was clinically anxious at the time and he felt counselling was the appropriate approach to help him deal with those problems. He advised the plaintiff to return to an area with which he felt comfortable such as his job as a supervisor previous to his promotion. It is common case that Dr. Halpin communicated that general view to Ms. O'Toole and also in the course of so communicating drew her attention to the fact that the plaintiff might experience "ego problems" by virtue of going back to a position that might be perceived

to be lower than the one he had formerly held.

16. Dr. Halpin's evidence on 20th April, 2005 was as follows:-

> Q. 223 So you recommend that he should be started back within his comfort zone
>
> A. Yes
>
> Q. 224 And you recommended that that should be the position of supervisor
>
> A. Yes
>
> Q. 226 And you indicated that it may cause some ego problems
>
> A. Yes

17. Dr. Halpin also said that both he and the plaintiff felt that the perception of other employees might be that he was not capable of doing his job.

The Nortel Shelf Period

18. There is significant controversy over much of what occurred during the remainder of the plaintiff's active employment. It is common case that Dr. Halpin's recommendations were appropriate and that, in the circumstances, there was nothing inappropriate in the employer, at least initially, putting the plaintiff back into a less stressful job. It would also appear that the original supervisor's job which the plaintiff held prior to his promotion was no longer available. It is common case that, with his agreement, the plaintiff was placed in charge of the Nortel Shelf.

19. However there are significant conflicts of evidence between the plaintiff and Ms. O'Toole as to much of the remainder. The plaintiff's case is that he agreed to do the job as supervisor on the Nortel Shelf for a period of four weeks as a means of re-integrating himself into the workforce and that thereafter it was contemplated that a more challenging and significant job would be sought for him. He has further given evidence that he contacted Ms. O'Toole over the following weeks and short number of months on a regular basis with a view to complaining that the job which he had been given was a "non job" and about other conditions such as cold and the absence of protective clothing. He further suggests that senior management (including Mr. O'Halloran) ignored him. He complains that the job he was given was such that it involved, in practice, very little work and was of a nature and in a location where that fact would be obvious to many others in the workplace and in particular those with whom he would have worked in the DELL section.

20. On the other hand Ms. O'Toole denies that the plaintiff made regular complaints about his work and suggests that the first serious discussion of substance that she had with him occurred in mid February as a result of a meeting which she had requested because, she suggested, she was concerned at that point about the plaintiff's level of attendance. She agrees that as part of that discussion the plaintiff complained about being bored.

21. It is necessary, therefore, to reach conclusions as to what actually happened in relation to the plaintiff's period of work on the Nortel Shelf before considering any possible liability on the part of the defendants in that regard. Before so doing I should note that both sides make significant general allegations in relation to this period. It was maintained by the plaintiff that the actions of the defendant during this period were consistent with a deliberate attempt to place the plaintiff in a position where he would no longer wish to work for the defendant. Such a situation where an employee is placed deliberately in a situation where they have little or no work to do was somewhat graphically described by Mr. Trevor Rufli, a psychologist called in evidence on behalf of the plaintiff, as "rust out" in distinction from "burn out". Based on such contentions that plaintiff has sought aggravated or exemplary damages.

22. Similarly the defendants in the course of the hearing alleged that the plaintiff had been looking for what was described as an "exit strategy" for some considerable period of time earlier to the events of the fist months of 2002. This contention is based upon the fact that the plaintiff put in train in the middle of 2001 arrangements to seek the appropriate licences which have ultimately enabled him to commence work as a taxi driver.

The contested facts

23. Much of the assessment of the contested facts during this period comes down to a consideration of the evidence of the plaintiff and Ms. O'Toole. There are, however, some other minor areas which are of some relevance. On the plaintiff's side some of his witnesses confirmed that in their view the work which he seemed to be doing on the Nortel Shelf was limited and that he seemed to spend periods of the day reading newspapers. On the defence side Mr. O'Halloran denied having ever consciously ignored the plaintiff. I found Mr. O'Halloran to be a convincing and truthful witness and I am not satisfied that he, on any occasion, engaged in any activity which was deliberately designed to convey to the plaintiff that he was not wanted by the defendant company. Indeed the number and nature of the incidents relied on by the plaintiff for this contention are sufficiently minor and infrequent that it is entirely possible that they occurred in broadly the manner which the plaintiff describes without Mr. O'Halloran noticing it. Likewise I am not satisfied that any of the actions of Mr. O'Halloran could be said to give rise to any breach of a duty of care on the part of an employer whether taken alone or in conjunction with other matters. If they were part of concerted plan on the part of the employer to exclude the plaintiff then they might, as part of such a plan, be of some materiality. However I am not satisfied that there is any evidence from which it might be inferred that Mr. O'Halloran was in anyway concerned to exclude the plaintiff.

24. It is therefore clear that a resolution of this issue comes down to an assessment of the accounts given by the plaintiff and Ms. O'Toole.

25. The key substantial difference between the plaintiff and Ms. O'Toole is as to the extent of the contact which the plaintiff had with Ms. O'Toole during the Nortel Shelf period and the nature and extent of the complaints which he made concerning the fact that he had been given an non job and also complaints concerning the cold conditions in which he had to work and the absence of appropriate protective clothing.

26. The plaintiff gave evidence that four weeks after his return in early January he went to see Ms. O'Toole to enquire what might be "on the horizon" for him. He then went on (at Q. 235 on 15th April, 2005) to indicate that "over the couple of weeks of February I kept going in and asking her and she kept saying "no, nothing at the moment. No, nothing at the moment. No, nothing at the moment". And there was new areas in the factory. I was in with her several times once a week asking her what was going on. I actually went in and first of all complained about my manager, that I had very little contact with the new manager and that was over

the receiving. He never bothered sending me anything or giving me anything to do. I also asked her when I went in, I said, "look I need to do something. This job is killing me. I can't cope with this. Its cracking me up."

27. In the light of that evidence and further evidence to similar effect counsel for the defendant drew attention to the fact that in response to a request for further and better particulars of the plaintiff's claim which sought detailed particulars of complaints made in or around the relevant period the plaintiff's solicitors answered as follows:-

> "The plaintiff complained on two occasions to Aileen O'Toole; firstly, in February 2000, it was a "non job"; secondly on or about March 2002, that it was particularly cold in the area he was working and sought warm clothes and that he complained about the treatment he received from senior management".

28. Furthermore as part of his general complaint as to the consequences of stress the plaintiff contended that he had put on very significant weight due to comfort eating. However it is clear that his weight increased by only a little between the occasion when he was seen for his pre-employment medical assessment in early 2001 and the end of the year.

29. Having regard to those facts, to the plaintiff's initial evidence in relation to the frequency with which Mr. O'Halloran would have attended on the shop floor, and to the general way in which he gave his evidence I am afraid that I have had to come to the conclusion that the plaintiff has a tendency to exaggerate events. I am not convinced that his exaggeration stems from a deliberate intention to mislead. Nonetheless, at a minimum, I am forced to the conclusion that where he feels a grievance he is inclined to embellish the circumstances surrounding that grievance and that, therefore, it is necessary to treat his account of the frequency and extent of the complaints which he made to Ms. O'Toole with a significant amount of caution.

30. I should also state that I have some doubts as to whether Ms. O'Toole's account of the relevant events is entirely accurate either. There is reason to suspect that her records of meetings and indeed her recollection thereof, may not be entirely accurate. Though the event is not, in itself, of any great significance she did give clear evidence that a meeting between herself and the plaintiff took place in mid October and that she had recorded it as occurring on 17th October. Indeed when the plaintiff had previously given evidence that he was on holidays on 17th October he was strenuously challenged by counsel for the defendant (presumably on the basis of instructions which in turn were based on Ms. O'Toole's intended evidence) that that could not have been so. However both the plaintiff's work attendance charts and an invoice from Falcon Holidays seem to confirm that he was indeed on holidays in the Canary Islands returning on the 18th October. I can only conclude, therefore, that Ms. O'Toole's records were incorrect. Furthermore I found her responses to many of the questions put to her while commendably brief to be such to the point of being almost formulaic.

31. I have therefore come to the view that it is probable that the plaintiff made somewhat more complaints to Ms. O'Toole about his conditions of employment during the relevant period but that, nonetheless, such complaints fell far short of having the frequency or extent that he himself has described.

32. Against that background it is necessary to assess the other areas of contention. For similar reasons I do not believe that there was any agreement between Ms. O'Toole and the plaintiff to the effect that his position would be reviewed in four weeks and that his assignment to work on the Nortel Shelf was for that period only. It may well be that the plaintiff anticipated moving on and may, indeed, have expressed a desire so to do in an informal way prior to his return to work but I am not satisfied that there was any agreement or understanding to that effect.

33. Furthermore I accept Ms. O'Toole's evidence that she had, by mid February, legitimate concerns about the plaintiff's attendance record. He had nine days of absence through sickness between his return in the first week of January and the end of the second week in February. It does not seem to me to have been unreasonable on Ms. O'Toole's part to have had a reluctance to place the plaintiff in a more challenging position while there remained a serious question over his ability to attend for work on a regular basis.

34. A further area of controversy concerns the extent of the work which the plaintiff was in fact required to do. The Nortel Shelf involved product connected with Nortel being received in and being assessed to ascertain whether there was appropriate information to allow it to be shipped on to a competitor plant in Wales who had, by that stage, taken over the Nortel business from the defendant. The product which was placed on the shelf was that in respect of which immediate shipment was not possible due to the lack of appropriate information. The job therefore required contact with various outside parties with a view to attempting to solve the difficulties created. A key difference between the plaintiff and Ms. O'Toole is as to the extent to which the plaintiff was responsible for what was called the receiving end of the Nortel Shelf. Prior to the product being looked at in first place it had to be received in and then assessed to ascertain whether it should go on the shelf or be shipped to Wales. It was the plaintiff's case that he did not have responsibility for this end of the process. It seems clear that towards the end of the Nortel Shelf period, there was a significant volume of product which had backed up at the receiving area. There was put in evidence an exchange of emails between the plaintiff and his immediate superior. Those emails operate, from the superior's position, on the assumption that problems at the receiving end were for the plaintiff to sort out. At no stage in the course of his replying emails does the plaintiff indicate that those problems were not within his responsibilities. I am therefore driven to the conclusion that the plaintiff's duties did include overall responsibility for ensuring that the receiving end of the Nortel Shelf process was moving in a proper fashion (though it should be noted that it is common case that he would not have been responsible for dealing with the receiving of product directly himself). I am therefore satisfied that Ms. O'Toole is correct when she indicates that the plaintiff's job was to a significant degree one of wider responsibilities than he maintained in evidence.

35. The plaintiff has also contended that the above emails, by their reference to the number of operatives available to the Nortel section, imply that he had come to be regarded as, at least in part, a general operative himself. This, he says compounded the problems concerning his status. However in the e-mails he makes no reply referring to this problem and I cannot, therefore, conclude that this was perceived to be a problem at the time. If there was a problem and it was raised I am satisfied that it would have been dealt with appropriately.

36. Having regard to all those factors I am satisfied that the Nortel Shelf job, while obviously significantly less onerous than the jobs previously occupied by the plaintiff in the DELL area, was nonetheless a significant appointment at least in the short to medium term. It is common case that the Nortel business would have phased out after a number of months in any event by virtue of the transfer of the business to Wales. I am also satisfied that the plaintiff did not make the level or extent of complaint about the job such as would have led Ms. O'Toole to have had reasonable grounds for believing that his continuance in that job would be likely to lead to psychological harm. I am satisfied that there was no concerted effort by the defendant to exclude the plaintiff from employment. In fairness to the plaintiff I should state that I am also satisfied that he did not have an exit strategy. While it is correct to state that he commenced his application for a PSV licence in the middle of 2001 I accept his explanation that at that time, and for some considerable time thereafter, the possibility of driving a taxi was merely an opinion that he was considering.

The Law
37. In *McGrath v. Trintech Technologies and Anor* (High Court, Unreported 29th October, 2004) Laffoy J. reviewed the authorities in relation to an employer's liability for psychiatric illness induced by stress and pressures at work. In the course of her judgment Laffoy J. cited with approval 16 "practical propositions" set out in the judgment of Hale L.J. in *Hatton v. Sunderland* (2002) 2 All ER 1 which are designed to assist in the assessment of such cases. While not all of those practical propositions will be relevant in each case, it was accepted by both sides that the principles identified by Laffoy J. represent the law in this jurisdiction.

38. As was pointed out in *Quigley v. Complex Tooling and Moulding* (Lavan J. Unreported 9th March, 2005):-

> "It has been a fairly recent movement towards the thinking that an employer must take care not only of the physical health of their employees, for example, by providing safe equipment, but also take reasonable care to protect them against mental injury, such as is complained of by the plaintiff in this case. It follows on from this that employers now have an obligation to prevent their employees from such that would cause mental injury i.e. stress, harassment and bullying in the workplace".

39. In addressing the basis upon which the court should approach such matter Lavan J. noted that:-

> "The fundamental question is whether the defendant fell below the standard to be properly expected of a reasonable and prudent employer".

40. It is thus clear that at the level of principle there is no distinction to be made in the assessment of the liability of an employer in cases where an employee claims that as a result of negligence he suffered, on the one hand, physical injury or, on the other hand, mental injury. Obviously the practical way in which the assessment of the duty of care which an employer owes may, however, differ.

41. As identified in *Hatton* it seems to me that the starting point for any consideration of liability in a case such as this must be ask the following questions:-

> (a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress;
>
> (b) if so is that injury attributable to the workplace; and
>
> (c) if so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.

42. I would propose to address those questions in turn.

Injury
43. On the basis of the evidence of Dr. David Shanley and the other medical witnesses called it seems clear that the plaintiff has, in fact suffered an injury to his mental health which goes beyond what Dr. Shanley described as the ordinary stress which many in the workplace will suffer from to time and which does not, as a matter of principle, give rise to a claim for damages. Indeed there was no significant dispute about this fact at the trial of the action.

Causation
44. Again on the basis of the medical evidence there seems little dispute but that the mental injury which the plaintiff suffered arose out of his experiences in the workplace and may thus be said to be attributable to his employment.

Foreseeability
45. On the facts of this case the real issues come down to ones of whether it was foreseeable that the plaintiff would suffer the injuries concerned. In that context it is necessary to consider separately the position during the DELL management period on the one hand and the Nortel Shelf period on the other hand.

(a) DELL Management Period
46. Prior to the difficulties encountered in September and early October there is no evidence that the plaintiff was in anyway vulnerable to injury. It is clear from *Hatton* that injuries may be foreseeable either because having regard to the burden of work or other conditions in which the employee is required to work the risk of such injury ought to be anticipated generally by a prudent employer. Such a factor would potentially be applicable to all employees on the basis that it was foreseeable that any normal employee might suffer mental injury as a result of being exposed to the work and other practices concerned. Alternatively injury may be foreseeable in respect of an individual employee having regard to any particular vulnerability to injury known to the employer in respect of that employee.

47. For the reasons indicated earlier in the course of this judgment it does not seem to me that, having regard to such factors as those identified in Item 5 of the practical propositions specified in *Hatton*, that the objective threshold for foreseeability is met. There is no evidence from which I could conclude that the work load was more than is normal in the particular job. While it may be that the work turned out to be more demanding for the plaintiff I am not satisfied that there was any evidence upon which it is reasonable to infer that the employer should have known this. It does not appear that there is any real evidence that the demands made of the plaintiff were unreasonable when compared with the demands made on others in the same or comparable jobs. Nor were there any signs that others doing the job had suffered harmful levels of stress or that there was an abnormal level of sickness or absenteeism in the same job or in the same department.

48. Insofar as there may have been a particular issue, in respect of this plaintiff, there does not seem to have been any information available to the employer until such time as the plaintiff went sick in October which could have indicated to the employer that the plaintiff was suffering particular difficulties. Indeed it is clear on all the evidence that the plaintiff did not make any relevant complaints to his employer during this period.

49. In all the circumstances I am not therefore satisfied that there is any evidence from which I could conclude that objectively speaking the job which the plaintiff was required to do as manager in the DELL area was such as would foreseeably give rise to mental injury. Neither am I satisfied that, during that period, the employer had any particular knowledge of a vulnerability of the plaintiff to injury which should have led the employer to take additional care in respect of this particular employee. In all the circumstances I cannot see any breach of duty during that period.

(b) The Nortel Shelf Period

50. The situation is somewhat more complex during this period. Firstly the employer was aware of a particular vulnerability on the part of the plaintiff. The employer was aware that the plaintiff had already suffered from work related stress of a reasonably serious nature. Secondly the employer was aware from the report of Dr. Halpin that there was an additional risk in dealing with the plaintiff by virtue of the fact that while he was, on the one hand, unfit to go back to the job which he previously had held as manager, there was also likely to be problems encountered with the plaintiff's ego in the event that he was placed in a position which would be perceived as a demotion (even if not formally so) from the position which he previously held. It is, of course, common case, that it was appropriate to place the plaintiff in a position such as he did in fact fill at least initially upon his return. The real issue between the parties concerns the events which occurred in February and thereafter. For the reasons indicated earlier in this judgment I am not satisfied that there was any concerted plan on the part of the employer to seek to exclude the plaintiff from his employment. As also appears above I am satisfied that the plaintiff did make some complaint about the inadequacy of the work which he was been given but not as frequently or in the terms which he claims. In those circumstances I am not satisfied that the plaintiff has established a breach on the part of his employer of a duty of care during this period either. In coming to that view I have also taken into account Item 11 of the practical propositions set out in *Hatton* which indicates that 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. That proposition must, of course, be subject to a caveat that if the court was satisfied that notwithstanding the provision of such a service the truth was that an employer was intent on removing an employee the availability of such a service might be regarded as being more a matter of form than substance. However I see nothing in the evidence in this case from which it might be inferred that the provision of the counselling service to the plaintiff was in anyway a "going through the motions" on the part of the employer. In coming to that view I would emphasise that it is important for a court in assessing matters such as this not to be unduly blinded by the presence of practices and procedures which look good on paper but do not, in substance, amount to those necessary to ensure compliance with an appropriate duty of care. However even applying such a healthy scepticism to paper procedures I am satisfied that there was in substance an appropriate counselling service available to the plaintiff which ought to have allowed him to be re-integrated into the workforce in an appropriate way had that being both his wish and it being practically possible.

Conclusions

51. In all the circumstances it does not seem to me that it has been established that the employer in this case was guilty of any breach of duty of care then the plaintiff's claim must therefore fail.