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Managing Mental Health Triggers At The Workplace

Only last year, it was reported that 51% of Malaysia's workforce experienced work-related stress¹. Mental health is a crucial topic to be discussed, as it is paramount for employers to both acknowledge and prioritise the well-being of their employees, which would, in turn, boost their productivity. The WHO estimates that poor workplace mental health costs the global economy USD1 trillion annually. In Malaysia, poor mental health in the workplace costs the country's economy around RM14.46 billion, or 1 percent of the GDP².

The Occupational Health and Safety Act 1994 ("**OSHA 1994**") imposes a statutory duty on employers to ensure, so far as is practicable, the safety, health, and welfare of all their employees. It can be argued that an employer's duty to provide safe and healthy working environment³ is not confined to physical safety structures of the working environment alone, but also extends to mental health of employees, for example, addressing issues of bullying and sexual harassment.

It is also pertinent to note that there is an implied term of a contract of employment that an employer would not conduct itself in a manner which is calculated to damage the trust and confidence between the employer and employee. Thus, an employer may be held liable for breach of contract for failing to adequately manage such issues at the workplace.

Claims of Psychiatric Injury

Apart from claims of breach of contract, some jurisdictions outside of Malaysia have recognised claims for work stress and cases of bullying

¹ Mental Health Protection for the Workforce, *The Star*, August 16, 2022

² <https://www.who.int/news-room/fact-sheets/detail/mental-health-at-work>;

<https://codeblue.galencentre.org/2023/01/17/investing-in-employee-mental-health-in-malaysia-jason-loh-juhi-todi/>

³ s. 15 (1) of OSHA 1994

arising from the negligence of the employers. Earlier this year, a major manufacturing company was made to pay compensation of 2 million Swiss francs to its former employee after the court found that she was bullied at work, suffered psychological damage, and eventually forced out after she had reported safety failures by the company.

Actions for psychiatric injury have received serious consideration in cases involving professionals across the board, in private sectors and in governmental bodies. In other jurisdictions such as England and Australia, employees who suffer psychiatric injury as a result of being stressed at work or being bullied can claim damages in civil claim against their employers.

The first consideration in any negligence claim is whether the claimant was owed a duty of care by the defendant. As highlighted above, employers in Malaysia do have a duty of care under the law to provide a safe and healthy working environment to its employees. The question is whether any failure to carry out that duty could give rise to a claim for damages for psychiatric injury.

Once a duty of care has been established, the employee must prove that the psychiatric damage suffered was “reasonably foreseeable” by the employer. The foresight test, derived from ***Hatton v Sutherland (Court of Appeal)***⁴, reaffirmed that the employer’s duty of care arises where it was objectively foreseeable that psychiatric injury could foreseeably result from a particular task or tasks. Apart from the elements of “foreseeability”, an employee will have to establish the rest of the negligence action, which include a breach of the duty and damage resulting from such breach.

In ***Green v DP Group Services Ltd (UK)***⁵, the defendant employer was found vicariously liable for psychiatric injury suffered by its employee, who was known to have been suffering from clinical depression after being subjected to bullying and harassment from her fellow employees.

English jurisprudence has held that for an employer to be obligated to take the necessary steps to ensure the welfare of its employees, the indication of work conditions likely to cause psychiatric harm in an employee must be plain enough to a reasonable employer to realise that steps should be taken⁶.

Factors to take into account would be frequent or prolonged absences from work, which are uncharacteristic for the person concerned, there could be complaints made about it by the employee or from warnings given by the employee or others around them. Significantly, there must also be good reason to think that the underlying cause of the psychiatric injury is the actual occupational stress rather than other external factors which could arise.

Thus, it follows that if an employee complains to the management that they are being bullied or harassed, the employer cannot ignore the plain indication that there may be an existence of a hostile work environment.

⁴ [2002] EWCA Civ 76

⁵ [2006] EWHC 1898 QB

⁶ [2002] EWCA Civ 76

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Failure to take action would indicate a breach of the duty of care owed and may then give rise to a claim of negligence.

Practical Considerations for Employers

Employers must have mechanisms in place to handle these wrongdoings if and when they occur, an example being internal whistleblowing policies which impose an obligation on employees to speak up and raise their grievances where necessary. When employers are made aware of any complaint of bullying or harassment, the next step is to investigate the complaint accordingly with transparency and impartiality.

In Malaysia, workplace bullying often stems from cultural and organisational factors. The hierarchical structure of many companies can exacerbate the problem, as employees may be hesitant to report bullying due to fears of retaliation. The cultural norms of saving face and avoiding conflict can also contribute to underreporting. Thus, policies should be drafted in a way that when employers are made aware of complaints of harassment or bullying, the employees are accorded protection and do not face retaliation such as being subjected to, among others, disciplinary action when doing so.

If you have any queries, please contact Senior Associate, **Nurul Aisyah Hassan** (nah@lh-ag.com), or her team Partner, **Sharifullah Majeed** (sha@lh-ag.com).