BEFORE : LORD JUSTICE WARD, LORD JUSTICE LONGMORE, LORD JUSTICE SCOTT BAKER

JUDGMENT : LORD JUSTICE LONGMORE : C.A. 9th June 2005.

1. This is an appeal by the claimant in another stress at work case from the judgment of His Honour Judge Wilkie (as he then was) who dismissed her claim while sitting as a judge of the High Court, which he has subsequently become. The judge has set out the detailed facts in meticulous detail, but for present purposes I can summarise them as follows.

2. The claimant is Mrs Vahidi who was born on 17 August 1954. She obtained her certificate of education in 1975 and joined the staff of the defendant, Fairstead House School, on 1 January 1977 as a teacher of what is known as the reception class. This is the class above the nursery class which caters for 3 to 4 year olds. Pupils can stay until they are 11 years old. It is a small school with about 160 pupils and a dozen or so teaching staff. The claimant remained the reception teacher until she was dismissed on the grounds of ill health on 19 November 1998. By that time she had been off work between 17 October 1997 until 22 June 1998. She worked part time and then full time for the last four weeks of the summer term. She resumed her duties at the first part of the Michaelmas term but went sick on 24 October 1998 and has not worked since.

Background history

3. From 1981 to 1996 Mr David Wedgwood was headmaster of the school. In May 1984 the school obtained accreditation from the Independent Schools Joint Council ("ISJC"). In 1988 Mr David Wedgwood appointed the claimant as assistant head. A routine inspection by HM Inspectorate in November 1995 revealed areas of weakness which fell to be addressed by Mrs Buckenham who took over from Mr Wedgwood on 1 September 1996. Mr Wedgwood told Mrs Buckenham that the claimant might well be resistant to the changes that would be necessary.

4. One such change was to arise from the school's decision in May 1996 to participate in the Nursery Voucher Scheme announced by the government in January 1996 to take effect in April 1997. Details of the scheme were published in a document called "The Next Steps" and advice to schools was given in a booklet called "Desirable Outcomes for Children's learning on Entering Compulsory Education". These Desirable Learning Outcomes (or DLOs as they are known in educational jargon) required nursery teaching for children of the appropriate age (3 to 5) to be organised around six desired outcomes and envisaged that teaching would be different from the way children of that age group had traditionally been taught.

5. Thereafter there were a number of incidents which persuaded the claimant that Mrs Buckenham sought to sideline her contribution to the school and eventually that Mrs Buckenham was anxious to bring about the end of the claimant's employment. The judge found that this belief of the claimant's was erroneous but that it nevertheless existed. The incidents included -

   (1) the moving of the nursery from its original site into the main part of the school. The nursery class teacher since 1992, Mrs Scheybeler, tried to interest the claimant in liaising their activities, but the claimant was not interested in doing so. After items had gone missing from the nursery classroom, Mrs Buckenham decided that the door between the nursery classroom and the reception should be kept locked. This was announced to the staff without prior notice to the claimant.

   (2) After the claimant had asked if she could move to Form 1, the class above reception, Mrs Buckenham agreed but 10 days later changed her mind.

   (3) When Mrs Buckenham got flu and could not attend the last day of the Christmas term she sent a note to the school secretary saying that the main problem was who was to take the final assembly, and adding, "I suppose it will have to be Suzanne if she is in." The claimant saw that note.

   (4) When it was decided that there should be a deputy head of the school, the claimant was not appointed to that post but became third mistress in charge instead of second with the title Senior Mistress, keeping the small additional allowance she already had as assistant head.

   (5) In early 1996, before any decision to participate in the Nursery Voucher Scheme had been taken, Mrs Scheybeler drew up a discussion document about its implications for the nursery and

reception class. The claimant returned this document saying she did not need it and had not read it. The significance of this incident for the purposes of the trial was that it showed that in 1996 the claimant felt she needed no help from Mrs Scheybeler but also that she was aware that, if the school did decide to participate in the voucher scheme, there would be implications for the teaching of her class.

6. The chief trouble, however, arose from the need for inspections. These were of two kinds, an ISJC inspection and an OFSTED inspection. The first was an ISJC inspection due to take place between 17 and 19 September 1997. The inspector, Mrs McClay, made a preliminary visit to the school on 26 June 1997. At this stage nothing was said to the claimant about any official requirement that the reception class would be inspected by OFSTED. When the ISJC report appeared it said that the nursery class quality of teaching had good coverage in each of the required learning areas, which were the six desired learning outcomes or DLOs I have already mentioned. The report on the reception class was not nearly so good, making it clear that the class was not working to the required curriculum or adopting appropriate methods of teaching. Too much emphasis was being given to English and Mathematics at the expense of science and technology and the requisite DLOs were not being achieved. This showed that the reception class was completely unprepared for the more serious HM Inspection of which notice had been given on 13 June 1997 that it would take place between 1 September and 31 December 1997. It did not in fact take place until 16 January 1998 by which time the claimant was off work.

7. After a series of meetings on 23 and 24 September 1997, the claimant agreed that she must work more closely with Mrs Scheybeler who would have responsibility for assessment profiles. The claimant began co-operating with Mrs Scheybeler in relation to DLOs, but asserted that the parents would not understand why they were necessary or support the forthcoming changes. She later described herself at that time as being in a blind panic without any real support from the school. She appeared to resent Mrs Scheybeler's attempts to assist. On 17 October she went to see her general practitioner complaining of agitated depression. She was by that time quite seriously ill. She absented herself from work until 22 June 1998. She was an in-patient at Dukes Priory Hospital, Chelmsford between 1 December 1997 and 13 January 1998. On 22 June 1998 she returned for the last few weeks of the summer term. This was after a meeting on 23 April 1998 between the claimant, Mrs Buckenham and the chair of the Board of Governors, Mrs Kerry. By this time the reception class had an early-years team with an early-years co-ordinator together with a supply teacher. These teachers were able to work out a curriculum in line with the required DLOs. The reception class passed the OFSTED inspection without difficulty.

The Period of Absence from Work

8. Dr Jackson of the Dukes Priory Hospital wrote to Mrs Buckenham on 9 January saying that he planned to discharge the claimant from hospital on 15 January 1998, but that she would need rehabilitation for 2 or 3 months before she could return to work. On 17 March the claimant's general practitioner, Dr Bailey, told Mrs Kerry, the chairman of the governors, that the claimant hoped to be well enough to return on 22 June but that her psychiatrist, Dr Webb, thought she should only work part time for the rest of the summer term. The meeting, which I have already mentioned, then took place on 23 April 1998 between the claimant, Mrs Buckenham and Mrs Kerry. The claimant said that she was feeling much better and would be ready to return to work in mid-June. Mrs Kerry was however concerned that, in the light of what Dr Bailey had said, and the claimant's own reluctance to attend a support meeting which she had been offered, a return to work might jeopardise the claimant's health. On 26 April she accordingly asked Dr Webb, with the claimant's permission, to make a further report on the claimant. Dr Webb saw the claimant on 30 April and recommended that the drug dosage which he had originally prescribed should be continued. But he was unable to report back to Mrs Kerry until 9 June when he said that the claimant was persuaded that her depressive illness was caused by changes in the school's working practices and in education generally in order to meet national requirements. He said that she was responding to treatment and that from a clinical point of view she was fit enough to justify a trial period back at work.

9. By 8 May Mrs Kerry became concerned that she had not yet heard from Dr Webb and decided to ask the claimant to see Dr Burgess, a consulting occupational physician. An appointment was made for 21 May. Dr Burgess reported on 27 May that the claimant felt that she had been sidelined and that her 20 years' experience of teaching was being questioned. He said however that she now appeared to be reconciled to the need for change but that her illness might get worse if further stressful factors became evident. He thought that the claimant could return full time and should be able to cope adequately with the help of an assistant. He thought that the medication could gradually reduce and that she should make a full recovery.

The Autumn Term

10. This term began on 9 September. The school was determined to give the claimant proper support. They allowed two weeks for the claimant and her reception class to get to know each other and to settle down. They arranged for weekly support meetings between the claimant and Mrs Scheybeler for her to go through the work she intended to do with the children. They also ensured that the claimant had an assistant teacher who would have a weekly brainstorming session (as it was called) every Wednesday with the claimant.

11. The first support meeting took place on Thursday 24 September. The claimant confirmed in her evidence that nothing stressful had taken place at the meeting with Mrs Scheybeler, but it seems to have been at about this stage that things began to go wrong again. It was noted that instead of staying in the staff room during morning break, the claimant would make herself coffee and then disappear. She went to see Dr Webb on Tuesday 29 September who recorded that she was doing fine until a few days before that appointment. The claimant told him at that appointment that she had stopped taking the drugs in mid-July without ill effect. He recommended that she should go back to the drugs and she should see him again in three months time.

12. On 2 October there was a further support meeting with Mrs Scheybeler. There was no weekly support meeting on 9 October, but the previous day the claimant and Mrs Scheybeler had gone together to visit the early-years section at King's School in Ely to gather ideas from that experienced school.

13. On 12 October Mrs Buckenham reported to the governors that all had seemed well at the beginning of term but that the situation had changed in late September. The claimant had looked unwell, become withdrawn and appeared confused at the weekly planning meetings. The classroom assistant had become unhappy at the situation.

14. At some stage between 29 September and 12 October the claimant told Mrs Buckenham that she had been to see her doctor and was hoping to be signed off medication. That had not however happened, and her condition was to be reviewed on 22 October. The claimant did not say that she had already stopped her medication when she saw her doctor.

15. Some time in early October the claimant received a jury summons. Mrs Buckenham said she was confident she would be excused, and suggested that the claimant should write a letter to the summoning officer explaining that she had just returned to work after a long absence through illness and that it was essential she should continue at work for the moment. The claimant did write such a letter saying that she was still on heavy medication and she was, in due course, excused.

16. There was no support meeting on 16 October since Mrs Scheybeler was unwell, so the next support meeting was on 23 October which was the last school day before half-term. That meeting with Mrs Scheybeler took place. Although the claimant never suggested that anything untoward occurred, at about lunch time the claimant could take no more, left the school and never returned.

The judgment

17. The judge decided that the school could not be blamed for the first breakdown because the school had had no notice of any incipient illness of the claimant. This conclusion is not the subject of any appeal. The judgment then concentrated on the period between 9 September and 23 October. The judge rejected the contention that the defendant was in breach of duty by focusing their support through structured meetings and setting and monitoring requirements. He then set out his conclusions on foreseeability in this way:

"60 ..... it has not been established that in respect of the first major depressive illness which began in October 1997 and ran through to June 1998 that it was foreseeable that the claimant would suffer medical illness. She was certainly under some pressure as indeed were Mrs Buckenham and Mrs Scheybeler, following upon shock at the outcome of the ISJC inspection on 18 September 1997. In my judgment, however, there was nothing in what happened in the succeeding weeks to suggest that she was remotely close to injury to health. The position is entirely different, however, concerning the relapse. It was plain that, upon her return to work, there might be stresses which would place her at risk of a relapse. This was not only foreseeable but was foreseen. Mrs Kerry foresaw it because it was a concern which she expressed to Dr Burgess and asked his specific opinion about. The opinion of Dr Burgess confirmed her concern. Furthermore, she expressed similar concern to Mrs Beattie [the claimant's trade union representative] in July 1998 and on 4 November 1998 Mrs Buckenham in a memorandum said, 'What we anticipated has happened - Suzanne would come back into full time teaching for at least a fortnight and then become unwell again.'"

The judge then set out the law on breach of duty, chiefly by reference to the well known judgment of Lady Justice Hale in **Hatton v Sutherland** [2002] 2 All ER 1. He then made findings for the purpose of coming to his conclusions about the allegations of breach of duty. What he said was this at paragraph 78:

"78 In his closing submissions, one matter upon which Mr Hamer focused his submissions was his contention that the defendant acted in breach of duty by failing to act on what they perceived as 'her deteriorating health'. He focuses on the minute of the governors' meeting on 12 October. Mrs Buckenham reports that 'in the last couple of weeks the situation has changed and she now looked unwell, had withdrawn and appeared confused at the weekly planning meetings'. Mr Hamer says that it was a breach of duty by the defendant in that context to persevere with the regime of structured meetings and to continue with monitoring her progress with a view to invoking, if need be, competency disciplinary proceedings. Rather, he says, that the defendant should at that stage have sent her home as unwell and sought further medical advice. He says that its failure to do so was in breach of its own recently adopted capability procedure which, by paragraph 4, deals specifically with a situation where there is concern about a person's medical condition impacting adversely on their capacity to perform the work required.

79 In this connection, I find that Mrs Buckenham had a conversation with the claimant very early in October. The claimant had been called for jury service. It was agreed that she would write to the court services seeking to be excused service on the ground that she was still under a high dosage of medication arising from her previous depressive illness. It was on that occasion that the claimant informed Mrs Buckenham that she had been to a doctor on 29 September hoping to be discharged from medication but that the medication had been increased to a relatively high dosage. Mrs Buckenham was also informed, as was the case, that she had a further medical appointment on 22 October. Thus, although Mrs Buckenham was observing deterioration in her condition, she knew that she was under medical supervision, she had not been certified unfit for work, medication was continuing and the medical position would be further reviewed on 22 October. I reject the contention that the defendant was in breach of duty by continuing to monitor the situation, continuing the structured meetings, and proposing to review the situation on competence grounds after the autumn break. If the medical situation changed, they would find out about it from the claimant. I have little doubt that had they sent her home, at a time when she was presenting herself as fit for work, because of their concerns about her medical condition that would have been construed by the claimant as a hostile act."

The judge then expressed his final conclusions at paragraph 81, saying:

81 … "In my judgment the claimant's mental condition collapsed under the strain arising from her attempts, albeit with reasonable support, to make fundamental changes to her method of teaching but with which she was unable to cope. It follows, therefore, that although I have great sympathy for the situation in which the claimant found herself and what has befallen her and great admiration for the steadfast support which her husband has given her, my conclusion is that her first and second instances of severe depressive illness were not caused by any breach of duty on the part of the defendant. It therefore follows that her claim against the defendant fails."

This Appeal

18. Mr Hamer - who appears here, as below, for the claimant - attacked the judge's conclusion on breach of duty in three ways. He said, first, that the school should have supported the claimant more fully by discussing with her during the period 9 September to 23 October whether in the light of her health she was truly able to do her work with the reception class. He submitted that the only substantive discussion on her health was in relation to the jury summons. He said, secondly, that in the light of the observed deterioration in the claimant the school should have sought further medical assistance for and in relation to her. Thirdly, he submitted that in the light of the claimant's evident failure to cope, the school should have sent her home either on full pay, as envisaged by the capacity procedures recently brought in to dealt with the health problems of staff, or at least on sick pay. Had they done some or all of these things the claimant would not have suffered the relapse she did suffer on 23 October 1998.

19. It seems to me that Mr Hamer's first submission must fail on the facts. To say that there was overall a failure to support the claimant is a travesty of the position. As soon as she indicated a wish to return, Mrs Buckenham arranged a meeting to discuss her return with her. She was permitted to return part time for two weeks and then full time at the end of the summer term.

20. Once the autumn term began she was encouraged to get to know the children in the reception class in her own way for the first two weeks of term. Then three separate support meetings were held - on 2, 9 and 23 respectively - or four if one includes the visit to King's School in Ely. Mrs Scheybeler tried her best to co-ordinate and assist the claimant in her work; that was with Mrs Buckenham's approval. The judge made an express finding that there was no question of the claimant being set up to fail. The staff were anxious for the claimant to succeed and for her to put her depression behind her. Short of abandoning DLOs, considered to be desirable by the government, it is difficult to see what more the school could have done by way of support. It is no doubt the case that the staff were not making continuous inquiries of the claimant about her health, but their concerns were the cause of the support meetings that were arranged as set out in the judgment. The claimant's own expert in educational affairs accepted that this was good support. To say that the only interest shown in the claimant's health occurred after she received the jury summons simply does not accord with the facts.

21. The allegation that the school ought to have sought further medical assistance for or in relation to the claimant is in my view equally hopeless. Not only had the school sought and obtained reports from two doctors while the claimant was off work before 22 July 1998, but the claimant remained under the supervision of one of those doctors - Dr Webb - at her general practitioner's surgery throughout. It seems that it was on her own initiative that she came off her medication in July. But when things began to go wrong in September she went to see Dr Webb who advised that she should go back on her medication. The claimant herself made a point of informing Mrs Buckenham in late September or early October not merely that she was seeing Dr Webb (as she had been doing previously) but that she was hoping that he would say that the medication was no longer necessary. Although this was at a time when members of staff, including Mrs Buckenham, thought that the claimant was once again becoming withdrawn, the statement of the claimant was one which Mrs Buckenham, and thus the school, had no option but to take at face value. To suggest a further visit to Dr Webb before the visit scheduled for 29 September, or another visit to another doctor, would have been extremely intrusive and, effectively, to say that the school did not believe what the claimant was saying about Dr Webb (see paragraph 29 of Lady Justice Hale's judgment in Hatton v Sutherland). Like the judge, I feel it impossible to say that there was any breach of duty in the respect alleged.

22. Mr Hamer sought to rely on the speech of Lord Walker of Gestingthorpe in **Barber v Somerset County Council** [2004] UKHL 13 in which, despite the fact that Mr Barber was under medical supervision, it was said (at paragraph 68) that it might, on the facts, be more important for a school to accept disruption in its affairs than to lose a valued member of staff through psychiatric illness. But the facts of **Barber** were very different because Mr Barber's superiors had shown no hint of wishing to assist him whereas, as the judge has found, Mrs Buckenham and her colleagues sought to be (and were) supportive of the claimant throughout.

23. Mr Hamer's third submission that the school should have sent the claimant home is equally wide of the mark as a breach of duty. I agree with the judge's wise observation that such an action would be bound to have been perceived as a hostile act since it would indicate a lack of confidence in the claimant and would be just the sort of conduct that might have itself precipitated a relapse. As Lady Justice Hale put it in paragraph 34 of **Hatton v Sutherland:**

"In principle the law should not be saying to an employer that it is his duty to sack an employee who wants to go on working for him for the employee's own good."

Courts have to be careful not to conclude that an employer can only perform his duty to his employee by dismissing him or her. The same sort of consideration in my judgment applies to sending a claimant home and effectively prohibiting the claimant from doing the work which she wants to do.

24. Mr Hamer criticised the judge's approach in paragraph 79 of his judgment on the basis that he should have asked himself whether the risk of relapse was large or small in September or October 1998. He should have concluded that it was by no means a small risk and then have decided that the obligations on the school were substantial and that the school would then be driven to take the steps which Mr Hamer says should have been taken. This criticism of the judge is in my view misconceived. The judge's duty is to decide whether there is a duty of care; if so, whether there has been a breach of it; and, if so, whether that breach of duty has caused loss to the claimant. It is for the claimant to assert what it is the defendant did which it ought not to have done or what it is that a defendant did not do which it ought to have done.

25. The judge considered the allegations of breach of duty and disposed of them in an exemplary fashion, and I agree with his conclusions. That makes it unnecessary to consider the issue of causation. Like the judge, I would not propose to encumber this judgment with unnecessary observations on that topic save to observe, since there was argument about it, that even if I had thought that there was a breach of duty in any of the three respects alleged it must be at least problematical whether compliance with such duty would have averted any relapse on the part of this unfortunate claimant.

26. For these reasons I would dismiss this appeal.

27. One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present. Of course, mediation before trial is infinitely preferable to mediation before appeal. But it is a great pity that neither form of mediation has taken place in this case, or, if it has, that it has not produced a result.

28. LORD JUSTICE SCOTT-BAKER: I agree.

29. LORD JUSTICE WARD: So do I.

Order: Appeal dismissed with the costs of appeal to be assessed if not agreed.

MR KENNETH HAMER (instructed by Brachers) appeared on behalf of the Appellant

MR DERMOT O'BRIEN QC and MR STEPHEN ARCHER (instructed by Everatt & Co) appeared on behalf of the Respondent