



# Employment law and Mobility of Workforce

## Work-related stress. Where should this be on the risk-management agenda?

There is little doubt that complaints of work-related stress are increasing within the workplace across most countries worldwide. Such complaints often include elaborate demands for the employer to restructure the employee's role and responsibilities. These demands may be impossible to meet and can risk an extremely negative impact on the functioning of the employee's department or team. If one is to tackle this issue with confidence, one has to ask: what is the risk of being successfully sued by an employee on this issue?

### The overall context

Before examining this question, it is perhaps worth noting that many countries share a common approach to this issue. Few countries (if any) have laws specific to work-related stress. Instead, for the most part, an employee's rights have to be inferred from:

- Health & safety legislation
- Common law duties (e.g. the law relating to negligence)
- Legislation relating to working time
- Legislation relating to discrimination (which can involve examination of any psychiatric damage caused by discrimination which takes place in the workplace)
- The law relating to harassment
- Legislation relating to (constructive) unfair dismissal.

The issue of work-related stress has been brokered between the European Social Partners in 2004. This resulted in a Framework Agreement being drawn up, which seeks to increase awareness and understanding of work-related stress. Its provisions set out to help identify problems of work-related stress and prevent, eliminate or reduce these problems.

Furthermore, the Framework Agreement provides a helpful definition of stress, which reads: "...a state, which accompanied by physical, psychological or social complaints or dysfunctions results from individuals feeling unable to bridge a gap with the requirements or expectations placed on them".

The clear definition provided by the Framework Agreement and its further provisions have the potential to change the landscape of work-related stress but it is commonly accepted that the Framework Agreement has had little legal effect so far. Few countries actually take into account its recommendations when litigating, and the definition of stress is not referred to in court or by the tribunals. The law in this area, therefore, continues to be a patchwork of legal obligations, which makes it more difficult for an employer to be aware of their various obligations.

In this issue we provide an overview of the basis for suing for work-related stress in certain individual countries and the impact the Framework Agreement has had, if any. One must examine the position in each country on an individual basis in order to determine the risk of being sued, before making an assessment of where this should be on the risk-management agenda.

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P a n n o n e



## Cyprus

Work-related stress has only recently been formally recognised as a concern within the context of employment, affecting efficiency, occupational health and safety, as well as having wider economic and social implications. At the European level, work-related stress is acknowledged by virtue of the European Framework Agreement on Work-Related Stress, dated 8th October 2004.

Nevertheless, the duties of the employer to 'take action to prevent, eliminate or reduce work-related stress', provided for in the said Agreement, have not been given the force of law. Instead, by virtue of that Agreement, member organisations of the signatory parties are simply invited to implement it.

Work-related stress is a novel concept in Cyprus. Indeed, it was not until the 17th June 2008 that the European Framework Agreement was implemented. The relevant implementation was effected by means of a Framework Agreement between the following social partners, namely "The Cyprus Employers and Industrialists Federation (OEB)", "The Cyprus Chamber of Commerce and Industry (KEBE)", "The Cyprus Worker's Confederation (SEK)", "The Pancyprian Labour Confederation (PEO)" and "The Democratic Labour Federation of Cyprus (DEOK)".

Cyprus is unique in the implementation of the European Framework Agreement on Work-Related Stress in that the relevant Cyprus Agreement was also signed by the Minister of Labour and Social Insurance. Albeit the said Cyprus Agreement is not binding in nature, the participation of the Labour Ministry adds value to the intentions of the parties.

The Cyprus Agreement consists of five articles. By virtue of Article 1, the European Framework Agreement is unconditionally adopted. Article 2 provides for a dialogue between the parties regarding the measures for implementation of the Agreement to commence in the 3rd quarter of 2008. By virtue of Article 3, the parties call upon their members, i.e. trade unions and employers' organisations, to begin a dialogue with a view to achieving the adaption and specialization of the Agreement to the particularities of the Cyprus work environment. And further, to do so at least before the following renewal of any relevant collective agreement (Article 4). Finally, in Article 5, the parties declare their availability to provide assistance and to intervene when necessary for the advancement of the process.

The signatory parties of the Cyprus Agreement on work-related stress, conclude with the acknowledgement that the implementation of the Agreement will contribute to the improvement of the working environment, the upgrade of working relations, the enforcement of the levels of cooperation in the workplace, the improvement of productivity, the enforcement of competitiveness, the saving of medical costs, the reduction of absences and the increase of work satisfaction.

The voluntary nature of the Agreement is conceived in Cyprus as being to the benefit of all parties concerned, as it would result in measures and/or practices agreed upon by all members of the employment industry.

Nevertheless, the end result is that the Cyprus employer remains free from any legal liability that might arise from any claim of damage suffered by the employee as a result of work-related stress. It is my opinion that in the absence of a legal duty placed on the employer in the context of work-related stress, the implementation of any measures agreed upon by the parties in Cyprus is in practice doubtful.

Until work-related stress is specifically defined and given legal effect, either at a European level or at a Cyprus level, employees' rights will continue to be inferred from the existing health and safety at work legislation, the law relating to working time, discrimination, harassment, unfair dismissal as well as common law principles relating to the duty of care in the context of negligence.



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## France

Following the Framework Agreement on Work-Related Stress signed by the European social partners on 8th October 2004, which defines stress as "a state, which is accompanied by physical, psychological, or social complaints or dysfunctions and which results from **individuals feeling unable to bridge a gap with the requirements or expectations placed on them**", provisions specifically addressing work-related stress problems were recently adopted in France within the framework of an industry-level agreement.

On 26th September 2007, the French social partners decided to dissociate the issue from the negotiations regarding hard work; negotiations on work-related stress were only started on 7th April 2008.

On 2nd July 2008, these negotiations were concluded with the signature of a national industry-level agreement on work-related stress fully in line with the European agreement.

The essential idea behind the agreement is that as soon as a stress problem is identified, action must be taken to prevent, eliminate, or, failing this, reduce it.

The agreement also identifies a few factors of stress such as:

- Work organisation and processes
- Working conditions and environment
- Communication
- Subjective factors (feeling of not being able to cope, perceived lack of support, difficulty in reconciling one's professional and private life).

The agreement institutes the liability of employers in stress-related matters and sets a general duty on workers to abide by the protective measures laid down by their employers.

At the same time, notably following the stir caused by a disquieting series of work-related suicides (at Renault, PSA, EDF, etc.) and the conclusion that existing mechanisms are insufficient, a report on the determination, assessment, and follow-up of psychosocial risks was handed to the French Employment Ministry on 12 March 2008. This report, which identifies stress as the greatest psychosocial risk, puts forward an eightfold action programme including:

- Setting up a global indicator following an annual survey of work-related stress in order to identify the sectors and branches with above-average stress levels
- Developing additional specific indicators
- Launching piloting schemes in the civil service
- Making a list of work-related employee suicides and analysing them from a psychosocial point of view
- Training the people working in the company and giving them a bigger role, the aim being notably to give the Health, Safety, and Working Conditions Committees (CHSCT) in each company a greater role by extending their whistle blowing right to serious risks relating to the organisation and intensification of work and to management methods that are not respectful of individuals.

Although the move to take work-related stress as such into account is only a very recent development, it is possible to tackle the issue of work-related stress under current French labour law through more general provisions, for two reasons.

One, although not recognised as such as an occupational disease, work-related stress is a risk factor for accidents at work or occupational illnesses, and two, it is an occupational risk laying on employers, according to the French Labour Code, a number of obligations regarding the protection of employees' health.

In fact, the French Social Modernisation Act of 17 January 2002 had been a first step in that direction

by including the **protection of the employees' mental health** in the employer's obligations in article L. 4121-1 of the French Labour Code (previously article L. 230-2). In order to ensure such protection the law provides that employers must implement measures for:

- The prevention of occupational risks
- The information and training of the people working in the company
- The provision of adequate organisation and means.

For that purpose, since a decree of 5th November 2001, employers must notably draw up a sole document assessing the risks to workers' health and safety, which must be made available to the CHSCT committees, to the staff representatives or, failing this, the people subjected to a health-related risk, to the company doctor, and to the work inspector.

Moreover, within French companies, the CHSCT committees, which are staff representatives, have an essential role to play in fighting work-related stress. Not only do they contribute to the protection of employees' physical and mental health, to their safety, and to the improvement of their working conditions, the CHSCT committees also contribute to the analysis of occupational risks, carry out surveys and preventive actions, and play an important consulting role the scope of which is currently steadily increasing.



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## Germany

The Framework Agreement on Work-related Stress of 2004 between the European social partners does not have any substantial impact on German legislation, jurisdiction or operational practice yet. There are some signs of the national social partners implementing the spirit of the framework agreement into the practice of their member companies and to make them more familiar with this topic. For example, lectures regarding this topic were held at the National Congress for "Occupational Safety and Health up to Date" as a

further step for the promotion of the framework agreement in 2006 or at the International Congress for Occupational Safety and Health in Düsseldorf in September 2007. Further, all social insurance organisations for occupational accidents ("Berufsgenossenschaften" - responsible for private enterprises as well as for the public authority sector) are strengthening their efforts to avoid or minimize work-related stress. For example, information in the form of brochures is circulated among the member companies or well-known internet based tools are implemented.

From a legal point of view this topic is also no major issue yet. As far as can be seen, there still does not exist any court decision in Germany as to the liability of the employer for personal injuries of the employee due to excessive work-related stress. A more popular subject of some court decisions has been workplace bullying. However, cases in which the employee succeeded with damage claims in this field are also still very rare. This does not necessarily mean that there is no legal protection against excessive work-related stress and relevant personal injuries. In connection with the employment agreement the employer is basically obliged to protect the interests of the employee particularly with regard to his health. This general obligation is specified e.g. in the labour protection laws (Arbeitsschutzgesetz) according to which the employee has to protect the employee against operational hazards. This could, in theory, be a legal basis for possible damage claims for personal injuries based on excessive work-related stress. However, at least regarding occupational injuries and diseases the employer is usually not directly liable. This liability is extensively transferred to the insurance organisations for occupational accidents. The employer might however be liable for work-related injuries, also if based on stress, in case they should not be considered occupational accidents or diseases in the above sense.

In summary, there are no law suits or relevant cases in relation to work-related stress in Germany yet. However, in view of the development in other European countries like in the UK or France it seems to be possible that this issue may come up in future.



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## Netherlands

In the event of psychological damage, a claim for damages by an employee may, under Dutch law, be based on two grounds: Section 7: 658 of the Netherlands Civil Code [BW] which states that the employer is obliged to make such provisions for the organisation as may reasonably be deemed necessary to prevent the employee from suffering damage in the course of his work. A claim may also be based on Section 7:611 BW, in which it is laid down that an employer is obliged to 'act as a good employer'.

Section 7:658 BW has a favourable division of the burden of proof as the employee only has to show that the damage is work related. Therefore, the employer has to prove that he has fulfilled his duty of due care. If the employer wants to avoid liability, he will have to show that the damage is the result of intent or deliberate recklessness on the part of the employee.

Under Section 7:611 BW on good employment practises, the employee must prove the employer's failure and the causal connection between this failure and the damage.

In the case of psychological damage, the employee must - also in the framework of Section 7:658 BW - argue and prove that the employer's failure to fulfil his duty of due care has resulted in the psychological damage. Since psychological damage is often partly caused by private circumstances, it is obvious that liability is qualified. An employer could end up in the 'danger zone' if an examination by, for instance, the company doctor has shown that there are (long-term) work-load problems.

Examples in case law resulting in liabilities are long-term frequent overtime, the necessity to also be available in the evenings, during nights and at weekends, and the combination between a high workload, lack of support, systems that do not function properly and a bad work place atmosphere. The liability of the employer was disclaimed in situations in which the employee had not complained sufficiently, or where psychological reports did not relate to the actual work, personal circumstances played an important role, and colleagues in similar positions had no complaints. A common argument is that, when it comes to reporting stress, more is expected from employees in 'high positions'.



At a national level, collective bargaining agreements often contain arrangements to control the workload; at a European level, as stated in the overall context, 'framework agreements' offer a framework for employers and employees to recognise stress, to prevent it and deal with it. It is true that the practical application of these measures is limited. Employers are therefore recommended to regularly put this subject on the agenda.



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## Spain

Spanish trade unions, CCOO and UGT, and employers' organisations, CEOE and CEPYME (the most representative social partners at national and inter-sectorial level), included the European Framework Agreement on work-related stress in the Intersectorial Agreement for the Collective Bargaining signed in 2005, which was signed with the aim of setting the basis for future negotiations in collective bargaining.

It is true that this Intersectorial Agreement is limited to giving guidance in collective bargaining situations. However, given the fact that work-related stress is not usually dealt with directly in collective agreements and legislation, it is initiating a change in this area because the workers' representatives and employers' organisations who signed the Agreement have highlighted the importance of the problem. They consider the European Agreement as a "specially useful instrument" as it provides guidelines and criteria that can be helpful to "create a greater knowledge and raise public awareness of work-related stress and its prevention, elimination and reduction".

Spain "seeks to implement the European Agreement, transmitting its content to employers' and workers' representatives adapting it to the Spanish reality" so that it serves to favour "the improvement of working conditions and the good running of companies".

In addition, during the last few years, Spanish trade unions and employers' organisations have published guides, leaflets and articles and have carried out multiple training and awareness raising activities relating to work-related stress. Furthermore, work-related stress has increasingly been dealt with from the perspective of prevention in Spanish companies, many of which have

dealt with this issue through agreements between employers' representatives and workers' representatives. Even so, this change is not always reflected in collective agreements, because, among many other reasons, bargaining related to labour risk prevention at company level happens in a participation framework which is unconnected from collective agreements.

The Supreme Court has ruled on repeated occasions that the employer has a duty to protect the health and safety of workers, in accordance with Directive 89/391, in all aspects related to work. This therefore equally applies to the problems of work-related stress. The employer has a duty to maintain, or at least to promote, a healthy working environment guaranteeing that the work does not cause psychological damage. When the damage to the worker's health is a consequence of stress, whether physical or psychological, they must evaluate the risk, and establish a prevention plan which includes both measures directed at avoiding problems and periodic health assessments.

The only way that workers will be protected against the psychological risk is using the labour regulations, such as the Prevention of Labour Risk Regulations (for example, where the work requires physical effort; strictly applying the regulations relating to working hours). As a practical consequence of this, Spanish legal precedents have established that, once the company has detected the existence of problems of stress, depression or anxiety as a consequence of the job, the employer has the duty to identify the problems, through analysing the organisation, the working conditions, the environment and the subjective factors, which include emotional and social pressures that the worker can be subjected to in his or her work environment.

The employer must take measures to avoid the risk in the future, or at least reduce it. If the employer does not do this, they will be taken to have failed to comply with the contract and this is cause for a breach of contract for serious non-fulfilment of their obligations. The worker may be awarded compensation of forty-five days of salary per completed year of work. In addition, this compensation for breach of contract is compatible with an additional compensation for separate damages, psychological or moral, arising from the stressful situation. This has been recognised by the Supreme Court in various cases. Moreover, the Court has referred to this compensation as a deterrent to passive or negligent conduct by the employer (T.S 20.09.07).



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## Israel

This summary is a short one due to the fact that there is no specific Israeli legislation nor any Collective Labour Agreement aimed at dealing with the problem of work-related stress.

In order to be more specific, I should emphasize that the absence of any such law or agreement refers to the matters included in the European Framework Agreement on Work-related Stress of 8th October 2004, meaning that there is no specific law or agreement aimed at identifying work-related stress problems or the prevention, elimination and reduction of such problems.

In Israel, the question of work-related stress is dealt with, if at all, through one of the following two avenues:

- (a) Through the question of safety at the place of work, for which we have a specific law (the Safety at Work Ordinance, 1970). However, unfortunately, this law does not include any specific articles dealing with work-related stress and, except for a large number of articles dealing with what is normally regarded as safety at work, there is a short chapter dealing with what is called employers' well-being. However, once again, those articles deal mainly with the physical conditions and not at all with specific environmental conditions which, as you know, may cause stress at work.
- (b) With regard to the possibility of employees' early retirement from work (meaning before the normal retirement age).

The problem with stress at a work place was also dealt with by the Labour Courts within the framework of the National Security Law, when employees claimed that accumulated stress at work can cause a "work-related accident" (for instance, a situation in which, due to long periods of stress at work, an employee suffers a heart attack). This question, in general, is known as "the micro-trauma doctrine". Employees also claim that continuous stress at work should be considered an "employment illness". However, under Israeli law, there is a clause listing employment illnesses, which does not include work-related stress.

Furthermore, in some judgments the Israeli Labour Courts decided that continuous stress should not be regarded as a combination of accumulated small



traumas resulting in a professional “work-related accident”, and there are some cases in which the Labour Courts found that continuous stress at work was the reason for work-related accidents.

In any case, as you can see, this legislation and Labour Court awards deal with the *outcome of stress*, and not with the question of prevention or reducing problems of work-related stress.

The only situation in which work-related stress, although not specifically mentioned as such, can be found as a basis for conferring legal rights is in cases of early retirement. Each year, for instance, Collective Labour Agreements are signed under which teachers retire early, a substantial part of whom can show medical opinions stating that continuous stress at work results in the need for an early retirement. But, again, this is a result of stress and not a measure for its prevention.

I can only hope that the European Work-related Stress Agreement will be adopted in the near future as a model to be implemented also in Israel.



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## United Kingdom

The Framework Agreement does not have legal effect in the United Kingdom and case law does not take it into account although reference may be made to it in a tribunal or court action in respect of another claim.

There is no one piece of legislation in the United Kingdom which deals specifically with stress. An employer’s liability can arise in different ways such as the following:-

### 1. Health & Safety

Under the Health & Safety at Work Act 1974 there is a general duty on employers to ensure the health, safety and welfare at work of their employees. The Management of Health and Safety at Work Regulations 1999 require employers to make an assessment of (1) workplace health and safety risks to their employees (2) health and safety risks to other

persons arising out of the conduct of the business for the purpose of identifying the measures needed to comply with legal requirements. This would include the need to assess the risk of developing stress-related illnesses. The Health and Safety Executive in the UK has issued guidance on risk assessment.

### 2. Common law duties

Employers are under a common law duty to take reasonable care for the health and safety of employees in the workplace. An employee would have to establish that the employer had a duty to protect them, that the employer had breached that duty and that they had suffered damage which was reasonably foreseeable as a result of that breach. Many cases rise or fall on whether the employees’ injury was reasonably foreseeable by the employer. The Court of Appeal has set out guidelines on when employees’ stress-related illnesses will be considered personal injury, which has made it more difficult for employees to succeed. In particular, it is clarified that no roles are inherently stressful and that the warning signs from employees play a fundamental role in establishing liability because until then an employer would not be on notice of the adverse effects of stress and the consequences would not be foreseeable.

### 3. Working Time Regulations

These regulations give a worker an entitlement to a 48 hour limit on the hours worked per week and to certain rest breaks. The United Kingdom government obtained the right for employees to “opt out” of the 48 hour weekly working limit, so it is rarely respected in practice. However, continually requiring employees to work over 48 hours a week can be relevant to personal injury claims.

### 4. Disability Discrimination

Stress may give rise to liability under the Disability Discrimination Act 1995 (DDA). The DDA only applies in respect of discrimination against a disabled person and therefore an employee would have to show that they had a disability which falls under the DDA to bring any claim.

In relation to other forms of discrimination, such as sex discrimination, race discrimination, and age discrimination, it is possible that any psychological injury caused by stress would constitute an injury or less favourably treatment. The compensation would be damages and a sum for injury to feelings.

### 5. Contractual liability

It is an implied term of every contract of employment that the employer will take reasonable steps to ensure employees’ safety. This includes a duty to take care not to cause psychiatric harm to an employee by reason of the character or volume of work imposed upon him. A highly pressurised work place or excessive work loads could lead to a breach of this duty for which the employee would be entitled to damages.

### 6. Permanent Health Insurance

It is a breach of contract to dismiss an employee absent from work due to stress, if

doing so would deprive them of the benefit of a permanent health insurance policy.

### 7. Unfair dismissal

Employees with one year’s service can claim unfair dismissal if they are dismissed. Stress-related problems, especially illness, often manifest themselves as absence from work. An employer would have to defend a dismissal of an employee absent with stress on the basis that they were not capable of performing their role and that the employer had acted reasonable in dismissing them for this reason. A fair dismissal would include obtaining medical evidence and discussing prognosis and adjustments before the dismissal was effected.

### 8. Protection from Harassment

Employers are now responsible in law for the acts of their employees in harassing others. Employees will be entitled to compensation from either or both of the harasser and their employer.



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