STRESS POSITION

David Marshall outlines a high stakes claim for stress at work, *Marsh v MoJ*

On 30 April 2015, in one of the more bizarre experiences of my career, I spent most of the day sitting outside Court Number 12 with my barrister Andrew Roy, excluded from a hearing in our own case.

The sign on the door read 'Marsh v Ministry of Justice: Private. No admittance - hearing in camera'.

Some passing Canadian legal tourists asked us if this was unusual. We bit our tongues and replied with just a terse 'yes'. Mr Justice Sweeney (as he then was) was hearing in our absence applications by the Ministry of Justice relating to anonymity of witnesses, redactions from some documents, and public interest immunity for others.

It was eight months until we had the outcome (reported at [2015] EWHC 3767 (QB)). The main reason for the delay became clear only then – during closed hearings and correspondence to which we had not been party, the judge had rightly insisted on a certificate signed by the minister, which did not arrive until 26 November after a final ultimatum given by the judge three weeks earlier.

We were disappointed that we had lost the trial date, for a second time, and that some relevant documents would not be seen by either us or the trial judge. But one of my trade union friends had the Che Guevara quotation 'Hasta la victoria siempre' ('Until victory, always') as his email sign off, and I consoled myself with that sentiment.

The trial

In the end the case consumed no fewer than 34 days of court time, including a 15-day trial.

The huge disclosure exercise, of which the public interest immunity application was part, proved to be 'an expensive waste of time' (per Thirlwell LJ in the costs judgment, unreported but a note of the judgment agreed by the parties is at *www.12kbw.co.uk/marsh-v-ministry-justice-costs-judgment-conduct-indemnity-costs-interplay-part-36-discount-rate* in a case 'that could scarcely have been harder fought'. The substantive judgment itself is reported at [2017] EWHC 1040 (QB)).

After obtaining huge quantities of non-party disclosure, the defendant decided to mount a defence arguing that the claimant was in fact guilty of serious misconduct in office. If so, he was not entitled to claim compensation for his injury, as he would have been dismissed for gross misconduct.

The claimant accepted this was correct if proved, so was faced with defending himself against these charges for the fourth time - having been cleared twice by internal investigations and the police having not charged him. The first 99 paragraphs of the judgment are directed to dismissing this defence.

The substantive claim was for psychiatric injury (or for 'stress at work') caused to a prison officer by his employer, the Prison Service (part of the Ministry of Justice). The claimant worked at Downview, a prison for female offenders.

The claimant was suspended from duty by the defendant in February 2010 when the police executed a search warrant at his home in the light of allegations of sexual misconduct made by a serving prisoner. This was

part of 'Operation Daimler' under which Surrey Police had been invited into the prison by the defendant in late 2009, to investigate allegations of widespread corruption, principally that prison officers were involved in sexual misconduct with prisoners. No charges were brought against the claimant. He remained suspended on full pay until the conclusion of a disciplinary hearing.

The claimant was referred to Anthony Gold in 2012 by his union the Prison Officers Association under our arrangement with them to handle cases where their usual solicitors are conflicted.

At that stage the claimant was still employed by the Prison Service, but remain suspended and was clinically depressed.

We notified a claim for psychiatric injury arguing that he should never have been suspended, or alternatively that his suspension should have been reviewed and ended long ago.

The defendant's response was inadequate under the pre-action protocol, but they did at last proceed with the internal disciplinary investigation and hearing.

Allegations against the claimant

The prisoner complainant had alleged to the police that she had been sexually assaulted by the claimant and another officer under the influence of alcohol (the 'rape allegation'). However, she had withdrawn the rape allegation before the disciplinary hearing.

She had also alleged to the police that the claimant had assaulted her by 'slapping, smacking, grabbing or squeezing her left buttock in the presence of another officer' (the 'slapping allegation').

The slapping allegation had been vehemently denied at the time by the claimant, who said that it was part of a harassment campaign against him by the complainant prisoner. It had already been dismissed by a short-form internal investigation some time before the claimant's arrest.

However, the judge held that 'given the change in landscape' it was not unreasonable to review this allegation by way of further internal investigation. Having heard evidence, including from the prisoner complainant, the governor dismissed the slapping allegation and invited the claimant to return to work in July 2012.

The claimant was suffering from depression and unable to work. On 30 May 2013 he was dismissed on the grounds of his ill health.

The prisoner complainant had been having a sexual relationship with one of the governors, who was convicted of misconduct in public office relating to this. She was deported after her release from prison, and did not provide a statement or give oral evidence in the personal injury proceedings.

The PI claim

The personal injury claim was brought on four principal grounds.

First, if the defendant had properly dealt with the prisoner complainant following the earlier investigation, the claimant would not have been caught up in Operation Daimler at all. The judge rejected this and held that the response to the original complaint had been adequate.

Second, the claimant argued that the Prison Service was under a duty to pass 'exculpatory' material to the police that would point to his innocence. Principally this related to the previous investigation of the slapping incident and another earlier incident which the police had previously investigated and correctly dismissed.

The judge held that there was no such duty on these facts at common law, and that in any event the claimant would probably still have been investigated and arrested.

The defendant argued that this allegation had given rise to the need for third-party disclosure from the police, but as the judge put it in the costs judgment, 'the documents were ultimately the defendant's documents. There was no need for an application for disclosure to retrieve them once the criminal trials were over. It was a matter of asking the police to return them'.

Third, the claimant argued that the defendant had been in breach of duty by suspending him - that this was a 'knee-jerk reaction'. Although the judge found the defendant's witnesses were not impressive, and not all relevant information had been before them, she decided that the suspension itself was not a breach of contract or breach of duty in these circumstances.

The fourth ground related to the length of the suspension - more than two years. In essence the defendant simply acceded to the view of the police that they would prefer it if there was no internal investigation until after all the criminal proceedings against others were concluded.

The defendant had not exercised their own judgment, nor had they properly kept the suspension under review.

The police had notified the defendant that there would be no charges against the claimant in September 2010. The judge found that the internal investigation should have been completed by May 2011.

As breach was not established prior to the arrest, foreseeability of injury prior to then was not in the event relevant.

The Prison Service had policies regarding stress, but no evidence was adduced that these were applied appropriately or indeed at all at Downview.

The defendant's witnesses were in some doubt as to who was responsible for health and safety at the prison at the time, and certainly no witness evidence was adduced from any such person.

There was evidence that another officer at Downview had developed psychological injury by reason of harassment by another prisoner. And by the date on which the judge found the defendant to be in breach of duty in continuing the suspension, they were actually aware, or ought to have been aware, of the claimant's ongoing psychiatric injury.

The judge found that had the internal investigation been completed by May 2011, the claimant would, with treatment, have been fit to return to work no later than May 2012 and would have remained until retirement at age 65.

However, she said that 'the claimant's life would have changed as a result... irrespective of the defendant's breach of duty. The claimant would have recovered from illness but with a risk of relapse of one third'.

So, although we had put forward a 'loss of chance' schedule with percentage chances of promotions, she dealt with her findings on causation in a rough and ready

way, by simply not allowing for any promotions in calculating the loss of earnings and pension claims.

In total, the judge awarded damages of £319,310. This included £25,438 in general damages; £36,596 in past losses; £224,538 in future losses; and Part 36 increases including £28,657 to represent a 10% increase on the award.

The discount rate

Between the end of the trial and the date of judgment, the discount rate changed from plus 2.5% to minus 0.75%. The judge applied the new discount rate. This nearly doubled the future pension loss and increased somewhat future loss of earnings.

Part 36 consequences

On any basis we beat our pre-trial Part 36 offer of £180,000, and Part 36 consequences applied.

However, the judge found that it would not be just for Part 36 consequences to apply from our earlier 2014 Part 36 offer, as we would have fallen just short (by about £6,000) without the increase in damages as a result of the change in the discount rate.

The defendant had not engaged with our offers of mediation. The judge did award us indemnity costs from July 2016, some months before our second Part 36 offer, due to the defendant's conduct. The rape allegation was 'hopeless and should not have been brought' and the amended defence 'a significant misjudgement'.

Risks in the case

The struggle here ended in victory for the claimant. The risks for everyone had been huge.

We had obtained after-the-event insurance, but this would have been insufficient to meet the defendant's estimated costs of nearly £750,000. So if he had lost, along with the loss of his reputation, the claimant also faced personal bankruptcy.

Anthony Gold and counsel, Andrew Roy and Vanessa Cashman of 12KBW, were all acting under conditional fee agreements.

The pre-Jackson recoverability of success fees (with a fixed CPR 100% uplift for stress cases) and *Lownds* proportionality applied.

I would like to think that we would still have pursued the case under the Jackson costs regime. But success fees for solicitor and counsel would have been capped at 25% of general damages and past loss (£15,510), a completely inadequate mathematical return on the risk run by the lawyers.

In theory, Jackson costs and case management would have worked to keep costs down, but given the interlocutory orders made, I am not so sure.

We do not know how base costs would have fared under Jackson proportionality. But this case clearly demonstrates the need to preserve the rule providing for assessed costs on the indemnity basis (without requirement of proportionality) in the face of either disproportionate conduct (here by the state itself as defendant) or where a Part 36 offer is beaten.

David Marshall is managing partner at Anthony Gold; Amanda Hopkins, senior associate at Anthony Gold, also contributed to the article