

EMPLOYMENT

**Mental health in the
workplace: *fail to
prepare, prepare to fail***

12 MIN READ

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Introduction

In recent weeks, organisations worldwide have been taking the opportunity to raise awareness of mental health in the workplace in recognition of World Mental Health Day (on 10 October 2024) and as part of Suicide Prevention Month in September. As the way we work and the nature of our work changes, mental health is becoming more important to employees and employers alike, bringing the topic higher up the agenda for health and safety regulators.

In this publication, we explore some recent developments that support this proposition and provide an overview of practical considerations and core legal obligations for employers who want to address employee wellbeing in a considered manner. We discuss some significant cases from the past 12 months where questions arose over the adequacy of how mental health was addressed in the workplace, including the

conviction of the Courts Services Victoria¹ (“**CSV**”) in Australia. The CSV was fined almost \$380,000 for a failure to properly identify and assess risks in relation to the psychological wellbeing of employees after it failed to take action when notified of allegations of a toxic workplace culture at the Coroners Court of Victoria that contributed to the suicide of one worker. The case provides a tragic example of the (not uncommon) overlap between employment and health and safety law. It also demonstrates just why an employer’s health and safety obligations are so important and reminds us of the significant consequences that can arise when there is a failure in employer duties.

¹ The CSV is responsible for overseeing the Coroners Court (Vic).

² Healthy Workplace Ireland: Survey of Mental Health & Well-being Promotion in Irish Firms, published March 2023



Mental health in the modern workplace

The recent worldwide awareness events showcasing the importance of mental health in the workplace serve as an important reminder of how far we have come as a society in terms of the progress that has been made in understanding and discussing mental health, and in appreciating the role that employers can play in promoting good mental health.

As society and the way we work has changed, so too has the prevalence and awareness of mental health issues in the workplace. We can see from a survey conducted by Healthy Workplace Ireland (published in March 2023) that:

- one in five Irish firms have experienced mental health related issues in the past year, while
- 76% of employers agree that they have a responsibility in supporting employee mental health.²

With increased awareness and publicity comes a corresponding increase in expectations from affected parties; from employees, to regulators. Case law and common sense tell us that, when things go wrong in this space, there is a potential for grave and far-reaching consequences, so for everyone’s sake, prudent employers will want to make sure this is an area they are on top of.

What is the legal position?

Employers owe a range of statutory and common law duties to employees, including those under health and safety legislation, employment equality legislation and the common law duty of care.

01

HEALTH AND SAFETY LEGISLATION

The Safety, Health and Welfare at Work Act 2005 (the 2005 Act) imposes an obligation on employers to ensure the health, safety and welfare of employees whilst at work, and, amongst other things, to provide a safe place of work. The 2005 Act, and in particular, Section 8, sets out the general duties of employers so far as is “*reasonably practicable*”, and these duties extend to both physical and psychological risks, including the reasonable prevention of harassment, bullying and stress-related injuries in the workplace. Simply put, an employer has an obligation to provide a safe place of work, to assess the working environment for systems and practices which may lead to health and safety hazards including mental health hazards, and where necessary to put preventative measures in place.

02

EMPLOYMENT EQUALITY

Under the Employment Equality Acts 1998-2021, employers are prohibited from discriminating against employees on the grounds of disability, and mental health issues have consistently been found by the Workplace Relations Commission (the WRC) to come within the definition of disability. Where an employer is on notice that an employee has a disability, that employer has a duty to provide reasonable accommodation(s) to the employee to enable them to carry out their employment duties, provided that this does not give rise to a disproportionate burden for the employer. Note that the WRC has found that “workplace stress” in and of itself does not constitute a disability for the purposes of the legislation; *Mr A v A Charitable Organisation* DEC-E2011-049. Employers also owe a duty of care to their employees and ordinary principles of negligence under tort law apply.

03

PERSONAL INJURY CLAIMS

An employee may bring a claim for personal injury against their employer in circumstances where they have experienced psychological injury as a result of a bullying dispute in the workplace. An employer will be required to demonstrate that they have acted reasonably in defending any such claim (e.g., that such situations were captured by their risk assessment, that appropriate steps were taken to prevent such occurrences; that they had adequate procedures in place; that they responded in an appropriate manner to any allegations or concerns that were raised; and so on).

04

CODES OF PRACTICE AND WORKING TIME LEGISLATION

The Industrial Relations Act 1990 (Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work) Order 2020 employers and employees’ obligations in relation to the prevention and resolution of workplace bullying under both health and safety legislation and workplace relations legislation are contained in the Code, while the Organisation of Working Time Act 1997 sets out statutory rights for employees in respect of rest, maximum working time and holidays.

Put the “building blocks” in place

It is often the case that, when mental health concerns arise in the workplace, the areas of employment law and health and safety law collide. Planning for and dealing with the existence of an actual or potential mental health issue is an obvious example of this in practice. For instance, it is not uncommon for symptoms of stress to materialise in the context of a bullying/harassment situation, or perhaps during a HR (disciplinary or performance management) process. When an employer is on notice that an employee may be experiencing mental health issues, what is the right course of action? We recommend that employers should, in fact, be proactively planning in advance, before any such concerns materialise, so that if a situation of concern does arise, there is a clear roadmap in place to guide both management and the employee through a considered and well thought out process.

01

RISK ASSESS:

Conduct a risk assessment to identify and assess potential (and foreseeable) psychosocial hazards in the workplace

02

REMOVE/ MANAGE /CONTROL:

Ideally, any risks identified will be removed. Where these risks cannot be prevented, employers should implement appropriate control measures to manage the risk of psychiatric injury. Document the risks, hazards, and safety measures in your Safety Statement.

03

POLICIES AND PROCEDURES:

Are there active and appropriate policies and procedures in place that consider and address the risk of psychological injury in the workplace?
Are these policies and procedures up to date? Are they appropriate?
Are they communicated and enforced?

04

ANALYSE:

Are the measures appropriate? Are they effective? Are they enforced?

05

CONSULT, TRAIN, AND COMMUNICATE:

Relevant employees and business leaders should be consulted and trained on the measures, the policies, and the procedures put in place.

06

ANALYSE AND REVIEW:

Employers should continue to actively monitor and review control measures, policies, procedures, and training to ensure ongoing suitability and effectiveness.

An employer's health and safety obligations provide fundamental "building blocks" for dealing with mental health issues when they arise and present an opportunity to put a stable and practical foundation in place from the outset. For example, we know that an employer's obligation to protect its employees from "harm" includes mental harm and this is something that employers can, and should, be building into their risk assessments and safety statements. But can more be done?

Many employers have taken great time and care to identify psychological hazards as part of complying with the statutory duty to carry out a risk assessment (for example, identifying factors associated with workplace stress, bullying, remote or lone working, and excessive workload). These prudent employers will likely have dedicated appropriate resources to eliminate and mitigate these risks and/or hazards by way of appropriate supports and controls, and initiatives such as Employment Assistance Programmes (**EAP**) or putting in place an occupational health or emergency response plan.

In our view, proactive employers can go one step further, by taking a more holistic approach and making efforts to ensure that these initiatives are married together with broader workplace policies and procedures, and by ensuring that adequate training is provided to employees, in particular managers, so that they are in a position to make informed decisions and take informed action should they be confronted with a mental health related issue concerning one of their employees. The findings, controls and response plans identified during the risk assessment stage should be used to inform and support, not just the safety statement, but the targeted workplace policies and training (including HR processes, such as performance management, grievances, mental health/health and wellbeing, and absence/illness policies).

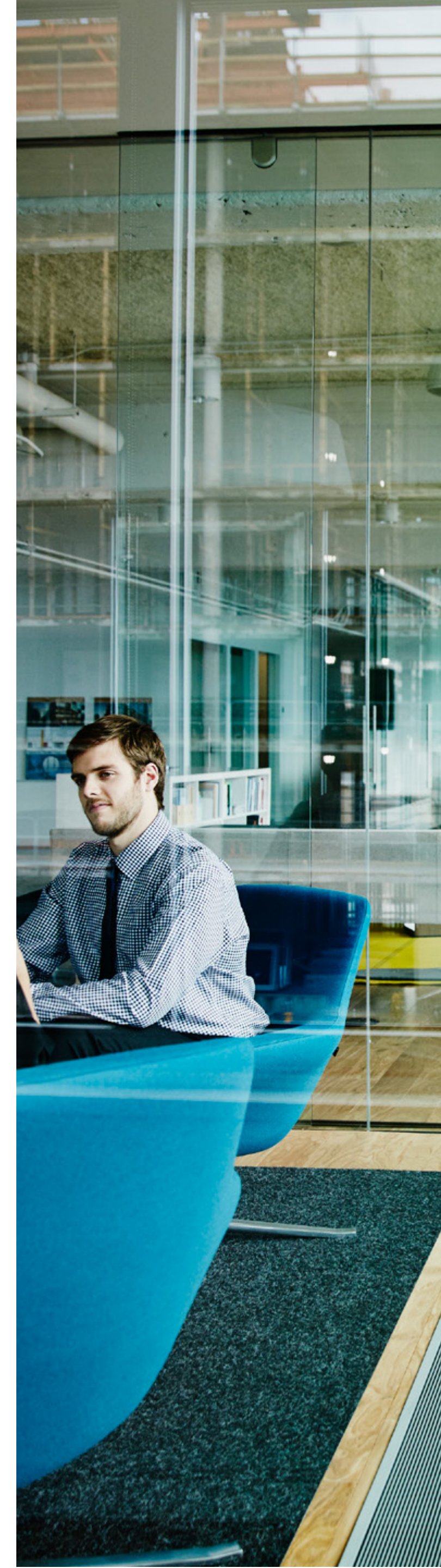
By taking these steps and putting robust "building blocks" in place, in the event that concerns regarding employee wellbeing arise in the workplace, an employer (or management) will be in a position to refer to their policies and procedures to inform them of what action to take early on in a HR process. For example, referring an

employee to occupational health may be an appropriate mapped out step, following which (and subject to that outcome), appropriate actions might include adjusting a HR process/schedule, revising working patterns, putting in place alternative arrangements and/or supports, or facilitating time off to attend medical appointments (as appropriate in the circumstances).

The consequences

The ongoing discussion around mental health generally has been instrumental in developing our understanding of the far-reaching consequences of mental health issues in the workplace, ranging from the every-day to the tragic.

At an organisational level, mental health issues can impact absence and performance management, grievance processes, poor culture, attrition, and productivity. Additionally, these issues can lead to negative publicity. This makes mental health a concern not just for health and safety professionals, but also for human resources departments, industrial/employee relations teams, and business management more generally.



Legally speaking, the consequences are just as broad and range from civil, such as claims for personal injury, disability discrimination or unfair/constructive dismissal to criminal. In more serious cases, employers, including senior leaders can face significant penalties under Irish health and safety legislation.³ In addition, the impact of a successful criminal prosecution can have broader ramifications, with knock on effects for matters such as insurance, disqualification and/or ineligibility for certain positions/tenders and negative publicity.

Prosecutions

The reality is, we live in a time where corporations and top-level management are being increasingly held accountable, a theme that ties in with an apparent rise in the number of individual prosecutions for health and safety offences in Ireland in recent years. It is therefore interesting and educational to monitor what is happening in other jurisdictions where themes such as individual accountability and prosecution for failures amounting to psychological harm are pursued.

To date, in Ireland, the majority of case law concerning work related psychological injury centres around negligence and personal injuries claims. Although theoretically possible for a number of years, prosecution for work health and safety breaches in connection with psychological injury is a relatively new and developing concept. However, we can look to other jurisdictions to get a sense of how this area of law and obligation is unfolding, with the aforementioned CSV case in Australia providing one such example.⁴

What happened in the CSV case?

Last year, the CSV pleaded guilty to failing to protect staff from bullying, overwork and vicarious trauma after an in-house lawyer took her own life and numerous other employees took stress-related leave. In this case, the Coroners Court was put on notice of potential workplace issues, after a 2015 staff survey identified inappropriate and bullying behaviour was occurring in the workplace. It was reported that “...staff soon began taking stress leave, reporting

feeling anxiety, stress, fear and humiliation.” During this period, workers made numerous complaints, including allegations of bullying, favouritism and cronyism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to future progression.

“All the warnings became tragic reality on September 7, 2018, when in-house lawyer Jessica Wilby died by suicide after being diagnosed with a work-related major depressive disorder...A note found at the scene read: [An acting CEO] ruined me.”⁵

According to Magistrate Glenn Walsh, the lives of many employees had been “put at risk” by the failure of the CSV, to protect staff from harm. “*The gravity of the offending is significant as is the culpability and degree of responsibility,*” Magistrate Walsh said, handing down the maximum penalty of \$379,157⁶ noting that the offending act was so serious he would have given them a harsher penalty if he could.

³Which, for a company, can range from improvement/prohibition notices to substantial fines, and for an individual, can include fines and/or imprisonment.

⁴Australia being a particularly useful comparator on the basis that they too are a common law jurisdiction, operating under similar statutory framework, with a modern regulatory regime that provides a good example of the latest developments in health and safety law.

⁵Coroners Court's toxic culture leads to maximum fine for workplace safety breach, Erin Pearson for The Age, 19 October 2023.

⁶Plus \$13,863 in costs.



Failure to act

In recent years, also in Australia, the Department of Defence (**Department**) was charged in connection with separate matters relating to mental health and psychosocial risks. In 2022, the Director of Public Prosecutions (**DPP**) filed three charges against the Department for alleged breaches of commonwealth work health and safety laws after a Royal Australian Air Force worker took his own life while on duty. According to the DPP, the Department failed in its primary duty of care (similar to our section 8 duties) when it failed to provide (in so far as reasonably practicable):

- safe systems of work
- necessary training to workers
- information necessary to protect all persons from risks to their health and safety

All charges related to alleged failures in managing risks to psychological health and safety during the administration of Defence workplace policies and procedures.

More recently, in April 2024, the DPP filed further charges against the Department in

connection with alleged failures which are said to have exposed an Australian Defence Force member to a risk of death or serious injury – including the risk of self-harm or suicide. Specifically, the Department is said to have failed to minimise or eliminate risks to health and safety at an army base in early 2022 by:

- not ensuring regular in-person health and welfare checks
- failing to refer a soldier for a formal mental health assessment, and
- failing to ensure a mental health intake assessment was not paused or delayed, and that it was conducted in-person or via video conference.

The various charges carry penalties of up to \$1.5 million.

Interestingly, while they were not connected to psychological harm, a number of cases that have gone through the Irish Courts over the past year have specifically called out employers' failure to act and penalties imposed have been noticeably higher in these cases⁷, while language typically associated with

employer health and safety duties is also being seen as part of civil proceedings in the higher courts (see more below).

Not an industry or job specific problem

On first glance, you might think that perhaps these cases are industry or work-type specific. But it is fair to say that no job or industry is immune to the risk of psychological harm. In 2023, the tragic death of a senior solicitor in the UK sparked much debate and discussion around stress and work life balance in professional services, as did the suicide of a Japanese engineer who was said to have been overworked and isolated while working for his Japanese employer in Thailand. The Osaka Minami Labor Standards Inspection found that the employee suffered from “... *accumulated fatigue due to unfamiliar trial run duties and a sudden increase in overtime work, as well as psychological burden due to the attention and guidance from other members*”.

In Bunbury in Western Australia, proceedings have recently been filled with the Magistrates Court⁸, as the State's safety regulator looks to prosecute the

Department of Justice for failures arising out of allegations of bullying and sexual harassment of a female prison officer at Bunbury Regional Prison.

According to the regulator (Worksafe WA), “*It is alleged that a failure by the department to have procedures in place to deal with inappropriate workplace behaviours caused harm to an employee, a female prison officer*”. In Western Australia (and most States across Australia), there are specific regulations in place governing employer obligations with regard to psychosocial⁹ hazards in the workplace.

In the context of global developments, this case is timely and relevant when we consider the changes taking place at present in the UK with regard to the positive duty on employers to now take steps to prevent sexual harassment in the workplace, and in circumstances where, according to the (UK) Equality and Human Rights Commission [guidance](#), an employer is unlikely to be able to demonstrate that they have complied with their preventative duty if they have failed to conduct an appropriate risk assessment in this regard.

⁷ E.g.: Ove Arup & Partners Ireland Limited were fined €750,000 as a result of an employee suffering a fatal workplace injury

⁸ The matter is listed for mention at Bunbury Magistrates Court in November 2024.

⁹ I.E. the combined influence that psychological factors and the surrounding social environment have on a person's physical and mental wellness and their ability to function.

Civil proceedings

Closer to home, in July 2024, a (civil) hearing began before the High Court after a General Manager brought a claim for psychological injury against his Longford based employer (Mergon International). In that matter, the plaintiff (Mr Farrell) claimed that he suffered an acute mental breakdown due to an unmanageable workload and work stress, in particular that:

- a significantly increased workload resulted in him being exposed to prolonged work-related stress and suffering a severe psychological injury
- he was allegedly required to undertake a level of work which was unsafe and posed a danger to his health and a risk of him suffering a psychological injury
- there was a failure to provide Mr Farrell with any adequate assistance and additional personnel, as well as a failure to monitor his workload or provide him with any support
- unrealistic deadlines were allegedly imposed and there was a failure to act on representations made by him with respect to his workload

The matter ultimately settled outside of Court but serves as a good example of work health and safety failures manifesting as a civil claim.

A way forward for employers

As the way we work and the nature of our work changes, mental health is likely to become a greater focus for health and safety regulation. What's happening in this space, both here in Ireland and overseas is evidence of that. The Irish regulator has produced various [guidance documents](#) on this topic, which are not only a helpful resource for employers, but may also suggest that, mental health and psychosocial influences are becoming areas of greater concern for them.

The CSV case provides an illustrative example of the consequences (both human and legal) when an employer fails to adequately plan for, and/or respond to, issues concerning the mental health and wellbeing of its employees. In a statement released following the sentencing, CSV

noted that it has “*made significant changes since 2018*” including:

- investing in its capacity and capability to identify and assess risk, including the appointment of a health, safety and wellbeing director and program manager, injury management advisers and a vicarious trauma project lead
- implementing new systems which, with the aid of technology helps identify issues of workload and exposure to difficult material
- developing and implementing a Peer Support Program and Mental Health First Aid Training and provides clinical wellbeing services to CSV employees

The fact that these actions are steps that could have been taken much earlier likely contributed to the Magistrate's views and scathing comments during sentencing.

Triple A – assess, analyse and take action

While these particular steps may not be appropriate or required for every workplace, there is no reason why proactive employers

cannot assess and identify suitable measures for their workplace before any concerns arise. The legal obligations around mental health are varied, and mental health issues by their very nature can be unpredictable. However, an employer's health and safety obligations provide fundamental “building blocks” and serve as a useful and important starting point for any organisation and employers should be mindful of the ongoing nature of their duties in this area.

By making mental health a core business consideration and focusing on putting stable foundations in place from the outset, employers will be well placed to demonstrate the reasonable and appropriate steps taken to comply with their legislative and common law duties. This can and should be complimented by regular and cyclical check points to ensure that the framework that you put in place is more than just words on a piece of paper, but something that is actively observed and enforced.



In this regard, employers can:

Assess: have you properly risk assessed your business for psychological and psychosocial risk(s)? If not, or if your organisation is tackling this for the first time, some helpful guidance on conducting a risk assessment for psychosocial hazards can be found in [here](#).

Analyse: is your health and safety data aligned with your broader business policies and procedures? Has training been provided to relevant employees and managers? Have they been consulted in the development of those policies and procedures? Are the measures in place appropriate, effective and enforced?

Take action: consult, train, record and review. Risk assessments, safety statements, policies, procedures and training will by their very nature need to evolve and all need to be reviewed on a regular basis to ensure that they are appropriate in scope and that they are implemented and enforced consistently

(just as they have been when considering “traditional” or “physical” work health and safety in the workplace). Employees and duty holders should be consulted accordingly, and employers should remember that these records may be the evidence relied upon if their actions are ever called into question. The steps in figure two may be useful to those actively reviewing or monitoring their internal framework.

The cases discussed in this publication demonstrate that, when considering the responsive measures taken by employers who have become aware (or ought reasonably to have known) of instances of bullying, harassment and other matters likely to cause psychological harm, both regulators and Courts expect action, not reaction. For the sake of all parties who may be impacted by mental health in the workplace, a proactive approach is key and we anticipate that as this area of law continues to develop, employers who fail to properly prepare for the mental wellbeing of their employees may find themselves in difficulty in the event that their (in)actions are ever scrutinised by the Irish Courts and/or safety regulator.

For further information in relation to this topic please contact Aisling Muldowney, [Aoife Gallagher-Watson](#), Senior Associate, [Caoimhe Grogan](#), Solicitor, or another member of the Employment team.



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