

Barry v Ministry of Defence [2023] EWHC 49 (KB)

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3PB

Introduction

1. On 3 March 2023, Johnson J handed down judgment in relation to former marine Mr Barry's claim that the Ministry of Defence (MoD) caused his noise-induced hearing loss. It is the first time judicial guidance has been expressly given on the reduction factors (other than mortality) since the revised guidance in the 8th edition of the Ogden tables were published in July 2020.
2. Although the MoD admitted primary liability in relation to its failure to protect Mr Barry's hearing in the course of his employment as a marine, MoD's case was that Mr Barry was at fault for failing to wear the hearing protection that was provided to him and failing to inform the MoD that there was no hearing protection available. The MoD argued damages should be reduced by 30% for contributory negligence but Johnson J rejected this. The court agreed that Mr. Barry was reliant on the MoD to provide the necessary equipment for hearing protection, which they failed to do.

Key Issue

3. The case considered the quantum of damage, specifically future earnings and whether the Claimant was disabled within the meaning of the Ogden Tables and, if so, the appropriate reduction factor to apply.

Was Mr Barry Ogden Disabled?

4. For those not familiar with the definition of Ogden Disability, Paragraph 68 of the introduction to the Ogden Tables (8th Edition) provides that a person is classified as being disabled for these purposes if:
 1. he has a disability which has lasted for more than a year, and

2. the effects of the impairment limit the kind of paid work that he can do, and
 3. he satisfies the definition of disability in the Disability Discrimination Act 1995, i.e. if he has a physical impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities:
5. In this case it was not in issue that Mr Barry's hearing loss lasted for more than a year. Johnson J also rejected the Defendant's argument that Mr Barry's hearing loss did not affect the kind of paid work that he can do. As Johnson J found *'he can not serve in the military (as his medical discharge demonstrates). It is common ground that he can not be a police or fire officer'*.
6. In respect of the third limb, the MOD argued that Mr Barry was not disabled with the meaning of the DDA 1995 as, they asserted, his hearing loss did not have a substantive adverse effect on normal day to day activities and that, in any event, his hearing loss is ameliorated by the use of hearing aids. Both arguments were rejected, and Ogden Disability was made out.
7. In reaching this conclusion, Johnson J considered both the wording of the DDA1995 and also the Statutory Guidance. The Statutory Guidance address the matters to be taken into account in determining if a person has a disability. Johnson J found the following parts of the Guidance helpful:
1. A sensory impairment affecting hearing is a physical impairment for the purposes of the DDA1995: - Paragraph A6 of the Statutory Guidance;
 2. A substantial effect "is one that is greater than the effect which would be produced by the sort of physical... conditions experienced by many people which have only 'minor' or 'trivial' effects" - Paragraph B1 of the Statutory Guidance;
 3. It is important to focus on what the person cannot do, not on what they can do. Thus, account can be taken of day-to-day activities which the person avoids doing because of the impairment; - Paragraph B8 of the Statutory Guidance;
 4. the ameliorating effect of a hearing aid must be disregarded: - schedule 1 paragraph 6 of the DDA 1995, and Paragraph B13 of the Statutory Guidance;
 5. When a person has hearing loss, account must be taken of the effects when the background noise is such that most people would be able to hear adequately: - paragraph D25(ii) of the Statutory Guidance;
 6. The Guidance gave two examples where it would be reasonable to regard a person's hearing loss as having a substantial adverse effect:

- i. a person who has difficulty hearing someone talking at a sound level which is normal for everyday conversations, and in a moderately noisy environment,
 - ii. difficulty hearing and understanding another person speaking clearly over a voice telephone with good reception.
8. On the facts Johnson J found that Mr Barry's hearing loss had a substantial effect on the claimant's day to day activities and after considering all the issues found that Mr Barry would be considered disabled within the definition set out in the DDA 1995.
9. Having found that Mr Barry was Ogden Disabled and rejecting the Defendant's submission that a *Smith v Manchester* award was appropriate Johnson J, applied a conventional multiplier/multiplicand calculation. He then went on to consider the appropriate reduction factor.

What was the Appropriate Reduction Factor?

10. The Claimant's pleaded case was Employment Level 1, disabled and employed (albeit at the time of the assessment Mr Barry had recently become unemployed). This gave a post-accident reduction factor of 0.35. However in terms of Education, Johnson J found that Mr Barry's qualifications best met Education Level 2, which would provide a disabled reduction factor of 0.45, and a non-disabled reduction factor of 0.89.
11. Johnson J recognised however that the disabled figures are an average across all of those in employment who have a disability and that in some cases, it is not realistic or appropriate to apply this average figure, and in such cases an adjustment may be made. It is also important to bear in mind, and as acknowledged by Johnson J, that applying an unadjusted factor of 0.45, in effect, assumes that Mr Barry will spend more than half of his remaining working life out of work.
12. Johnson J was critical of using a "mid-point" approach as had been adopted with some enthusiasm in past cases. Johnson J noted that the explanatory notes at paragraph 91 to the Ogden Table refer to the fact that where a departure is appropriate it will usually be a modest departure.
13. In considering the appropriate reduction factor Johnson J, considered the following factors to be relevant:

1. Mr Barry's case was not at the outer fringe (in the Billett sense) of the spectrum covered by disability (it fell squarely within one of the examples given in the Guidance);
2. he was not pursuing his chosen career, his disability affected the career choices that were open to him;
3. even with the ameliorating effects of a hearing aid it is likely to have an impact on his career;
4. Mr Barry's hearing will deteriorate further in the future;
5. using the mild/moderate/severe scale in the Ogden Tables, Mr Barry's disability is currently in the range of mild to moderate;
6. The impact of his disability was substantially ameliorated by the use of hearing aids;
7. Until very recently, he had been in work continuously since his discharge from the military (a period of 6 years);
8. all of the evidence indicates that he has the drive and determination to recover from setbacks.

Outcome

14. After considering these features and principally, the effect of hearing aids and the fact that Mr Barry has been able to maintain employment throughout the period since his medical discharge (until very recently) Johnson J considered that the appropriate reduction factor was best reflected by using Education Level 3 rather than Education Level 2. A reduction factor of 0.56 was adopted, which is the appropriate reduction factor for 'Disabled/Employed/Level 3 Education'.

Conclusion

15. In conclusion, this case provided useful insight when considering the revised guidance on the adjustment of reduction factors for contingencies other than mortality in Ogden tables (8th Edition). The learning points from the case regarding the reduction factors:
 1. The Statutory Guidance to the DDA1995 is very helpful and should be read whenever the issue of Ogden Disability has to be considered.
 2. It may be more appropriate for an adjustment to be made to the reduction factor utilising a different education level, as these more modest adjustments better represent greater employability, without underplaying the effect of disability.

3. The court should take into account whether some amelioration may be available for the Claimant so as to reduce the 'extent' of the disability and adjust it as necessary for the level of disability.

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